Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-139

SHELL OIL COMPANY AND EXXON CORPORATION,
Petitioners,

v.

GAS-A-TRON OF ARIZONA AND COINOCO,
Respondents.

and

SHELL OIL COMPANY AND EXXON CORPORATION,
Petitioners,

v.

PETROL STOPS NORTHWEST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(Counsel listed on inside cover)

July 30, 1976

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PETROL STOPS NORTHWEST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Shell Oil Company ("Shell") and Exxon Corporation ("Exxon") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 29, 1976. The panel composed of Circuit Judges Browning and Hufstedler and District Judge Renfrew (sitting by designation) *sua sponte* withdrew its original *per curiam* opinion and substi-

tuted a revised opinion reversing in its entirety an Order jointly entered by two judges of the United States District Court for the District of Arizona disqualifying on ethical grounds Richard D. Burbidge, Esquire ("Mr. Burbidge") and the Daniel L. Berman law office (the "Berman office") from further representing respondents in that District in two private antitrust suits filed against Shell, Exxon and several other defendants.

OPINIONS BELOW

The revised opinion of the Court of Appeals for the Ninth Circuit in *Gas-A-Tron of Arizona and Coinoco* v. *Union Oil Co. of California, et al.* (Nos. 74-3287, 74-3288) ("*Gas-A-Tron*"); *Petrol Stops Northwest* v. *Continental Oil Co., et al.* (Nos. 74-3289, 74-3290) ("*Petrol Stops*") is unofficially reported at 1976-1 CCH Trade Cas. ¶60,862 (9th Cir. 1976).[1] The initial opinion of the Ninth Circuit in *Gas-A-Tron* and *Petrol Stops* is unofficially reported at 1976-1 CCH Trade Cas. ¶60,689 (9th Cir. 1976).[2] The Memorandum and Order jointly entered by District Court Judges William C. Frey and James A. Walsh in these cases is unofficially reported at 1974-2 CCH Trade Cas. ¶75,225 (D. Ariz. 1974.[3]

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

A judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on April 29, 1976; an order

[1] Reprinted in Appendix A to this petition.

[2] Reprinted in Appendix B to this petition.

[3] Reprinted in Appendix C to this petition.

denying petitioners' suggestion for rehearing *en banc* was entered on July 6, 1976.

QUESTION PRESENTED

Whether this Court, which has never spoken to the principles of professional responsibility addressed by Canons 4 and 9 of the Code of Professional Responsibility of the American Bar Association, should reinstate a trial court ruling entered by two district court judges in companion lawsuits which interprets those principles to preserve the inviolability of the attorney-client relationship and promote the integrity of the legal profession, or whether this Court should permit an intermediate appellate court to undermine those important public policy goals for the sole purpose of permitting an attorney to change law firms and immediately thereafter actively participate in prosecuting litigation against his former clients.

STATEMENT OF THE CASE

The law office of Daniel L. Berman of Salt Lake City, Utah, instituted these private antitrust suits against Shell, Exxon and several other defendants in the United States District Court for the District of Arizona, Tucson Division, in late 1973.[4]

[4] The jurisdiction of the District Court was invoked pursuant to 15 U.S.C. § 15 (1973). In the *Petrol Stops* complaint, filed on behalf of an independent marketer of gasoline in Tucson, plaintiffs alleged that petitioners and ten other defendants had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, by unlawfully conspiring to restrain trade and to monopolize trade in the manufacture, sale and distribution of refined petroleum products. In the *Gas-A-Tron* complaint, filed on behalf of two other Tucson gasoline distributors, plaintiffs alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, similar to those made in *Petrol Stops* and also claimed that petitioners and seven other

Within a few months after the Berman office filed these complaints, Robert L. Norris, counsel for Exxon, observed that plaintiffs in both *Gas-A-Tron* and *Petrol Stops* were actively represented by Richard D. Burbidge ("Mr. Burbidge") who had very recently joined the Berman office after serving as counsel to both Shell and Exxon while associated with McCutchen, Black, Verleger & Shea ("McCutchen"), a Los Angeles, California, law firm. (C-2). The record demonstrated that Mr. Berman hired Mr. Burbidge without consulting any member of the McCutchen firm or any attorney for Shell or Exxon about the possibility of a conflict arising from Mr. Burbidge's joining the Berman office. Although that office was actively prosecuting the *Gas-A-Tron* and *Petrol Stops* lawsuits while Mr. Burbidge was with McCutchen, Mr. Berman did not question Mr. Burbidge about a possible conflict until the issue was raised by Exxon's counsel who observed Mr. Burbidge representing the plaintiffs at a deposition in this litigation only eight days after leaving McCutchen. (C-7, C-8).

On March 22, 1974, Exxon moved to disqualify Mr. Burbidge and the Berman office from both *Gas-A-Tron* and *Petrol Stops* (R.120-R.162, R.596-R.613)[5] to prevent "confidential information obtained by Richard Burbidge in the course of his professional relations with Exxon" (R.121) from being used against his former client in the pending litigation. The motion was based upon the standards of conduct prescribed by

defendants violated the Robinson-Patman Act, 15 U.S.C. § 13(a), by engaging in unlawful price discrimination.

[5] All "R" references are to the record on appeal which petitioners are requesting the Ninth Circuit's Clerk's office to deliver to this Court.

Canons 4[6] and 9[7] of the American Bar Association Code of Professional Responsibility. Shell filed a similar motion (R.138-R.162; R.613-R.636).

Petitioners' disqualification motions were supported by affidavits[8] and extensively briefed.[9] With the consent of Shell and Exxon, the initial hearing on their disqualification motions was postponed to permit the Berman office to depose Shell's and Exxon's counsel and the McCutchen partners who supervised Mr. Burbidge's work for Shell and Exxon. Mr. Berman deposed Franklin H. Wilson, for whom Mr. Burbidge worked on Shell matters, but abandoned his plans to depose Jack D. Fudge, who supervised Mr. Burbidge's work for Exxon.

A. The District Court's Disqualification Ruling

After considering Shell and Exxon's motions at a consolidated hearing, Judges Frey and Walsh entered a jointly signed Memorandum and Order disqualifying Mr. Burbidge and the Berman office from participating further in both the *Gas-A-Tron* and *Petrol Stops* suits "so long as the cases involve Shell or Exxon." (C-9). Their decision focused particular attention on those record facts which displayed Mr. Berman's disregard

[6] Canon 4 provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client."

[7] Canon 9 provides: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

[8] (R.128-R.130; R.131-R.132; R.141-R.142; R.310-R.317; R.333-R.351; R.605-R.607; R.608-R.609; R.618-R.619; R.785-R.792; R.808-R.826).

[9] (R.123-R.127; R.146-R.162; R.163-R.244; R.269-R.351; R.600-R.604; R.623-R.636; R.637-R.676; R.743-R.775).

of the ethical principles stated in the Code of Professional Responsibility. Because of Mr. Berman's past experiences litigating in this industry, the District Court found that he "should have . . . known" of the McCutchen firm's close relationship with Shell and Exxon. (C-2). Since *Gas-A-Tron* and *Petrol Stops* were pending while Mr. Burbidge was at McCutchen, the District Court found that Mr. Berman should have investigated the potential conflict arising from his employment of Mr. Burbidge. (C-7). In fact, neither Mr. Berman nor Mr. Burbidge "discussed with anyone" the potential conflict which would arise once Mr. Burbidge was "hired away" by the Berman office. (C-7).

The District Court's disapproval of Mr. Berman's actions was justified by the fact that within *eight days* after joining the Berman office, Mr. Burbidge was actively participating in the *Gas-A-Tron* litigation. The record demonstrated that Mr. Berman had assigned Mr. Burbidge to prosecute this action against his former clients, Shell and Exxon, as soon as the "hiring away" process was completed. (C-8). The active participation of Mr. Burbidge, absent any efforts to "screen" him from these cases, was the gravamen of the factual findings that compelled Judges Frey and Walsh to enter the disqualification Order.

The Order entered by Judges Frey and Walsh contained specific factual findings regarding the scope of Mr. Burbidge's responsibilities for Shell and Exxon at McCutchen and the relationship of those duties to the issues in *Gas-A-Tron* and *Petrol Stops*. The District Court found that while associated with McCutchen Mr. Burbidge "was Shell's counsel in four cases", two of which "involved the relationship between Shell and a dealer". (C-3). In addition, Mr. Burbidge "had

access to all of the Shell files in the McCutchen firm", including an antitrust action which "appear[ed] to be the same claim made by the [respondents] in these cases". (C-4). Prior to joining the Berman office, Mr. Burbidge had represented an Exxon employee in a case which "gave rise to a companion antitrust action" in which Exxon dealers challenged Exxon's marketing practices. (C-4).

Having made the factual determination that Mr. Burbidge "had access to confidential information about Shell and Exxon's dealer relationships, marketing practices and antitrust suits" (C-7), Judges Frey and Walsh concluded that the issues involved in *Gas-A-Tron* and *Petrol Stops* were "substantially related" to matters Mr. Burbidge worked on for Shell and Exxon at McCutchen. The District Court's analysis of the *Gas-A-Tron* and *Petrol Stops* complaints, deposition testimony and plaintiffs' interrogatories demonstrated that "one of the central issues in both [cases] is the relationship between Shell and Exxon and their dealers". (C-3). Accordingly, Judges Frey and Walsh disqualified Mr. Burbidge as well as "[t]he law firm of Daniel L. Berman and all members or associates thereof" from further participation in the antitrust suits "so long as the cases involve Shell or Exxon." (C-9).[10]

---

[10] Shortly after Judges Frey and Walsh disqualified the Berman office, respondents' local counsel sought "a clarification of the terms of disqualification imposed" (R.368; R.850), contending that the District Court applied an incorrect standard in ordering the disqualification (R.376-R.378; R.858-R.860). This motion was denied by Judges Frey and Walsh, who now have *each ruled twice* that the record before them supported the disqualification of both Mr. Burbidge and the Berman firm.

B. The Ninth Circuit's Initial Opinion Affirming Mr. Burbidge's Disqualification

Respondents appealed the District Judges' disqualification Order to the Court of Appeals for the Ninth Circuit. The panel initially *affirmed* that portion of the Order which disqualified Mr. Burbidge, but ruled as a matter of law that the remaining three lawyers in the Berman office could continue to sue their colleagues' former clients. (B-5). The appeals panel acknowledged that:

> *the district court was within the bounds of its discretion in ordering his [Mr. Burbidge's] disqualification to prevent any appearance of impropriety.* We cannot discount the district court's appropriate concern for the appearance of impropriety that can be caused when a lawyer, situated as was Mr. Burbidge, had physical access to a client's confidential information. (B-4). (emphasis added).

C. The Ninth Circuit's Substitute Opinion Overturning Mr. Burbidge's Disqualification

Shell and Exxon sought review of that portion of the Ninth Circuit's initial decision which permitted the remaining three members of the Berman office to prosecute the pending antitrust suits against them. Although Mr. Burbidge did *not* petition for a rehearing of the affirmance of his disqualification, the panel *withdrew* its initial opinion *sua sponte* and issued a substituted opinion reversing, in its entirety, the disqualification Order entered by Judges Frey and Walsh. (A-1).

REASONS FOR GRANTING THE WRIT

A. If Allowed to Stand, the Court of Appeals Decision Will Subvert Public Confidence in the Legal Profession and Weaken the Enforcement of the Canons of Professional Responsibility

In *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973), the Court of Appeals for the Second Circuit recognized that whether an attorney should be disqualified from representing a party in litigation against a former client presents "a question of acute sensitivity and importance, touching upon vital concerns of the legal profession and the public's interest in the scrupulous administration of justice." *Id.* at 564. In upholding the lower court's disqualification Order, the Court stressed that because of the importance of preserving public respect for the bar, disqualification may be necessary where the *appearance* of a possible violation of confidence exists. *Id.* at 571. More recently, in *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975), the Court of Appeals for the Second Circuit reaffirmed the "paramount importance" of maintaining the highest standards of professional conduct and the scrupulous administration of justice. *Id.* at 757. Likewise, other courts, adhering to well-established precedent, have also placed great wieght on avoiding the appearance of impropriety in ruling on disqualification motions. In *Richardson* v. *Hamilton International Corp.*, 333 F.Supp. 1049 (E.D. Pa. 1971), *aff'd*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973), the court found "*some* relationship" between an attorney's former representation and the current litigation. *Id.* at 1054 (emphasis added). Although acknowledging the case presented a "close question," the court con-

cluded that "to avoid the 'appearance of evil' disqualification must be directed." *Id.* Similarly, in upholding the disqualification of the City's counsel in *General Motors Corp.* v. *City of New York,* 501 F.2d 639 (2d Cir. 1974), the court noted: "[W]e must act with scrupulous care to avoid any *appearance* of impropriety lest it taint . . . the legal profession." *Id.* at 649 (emphasis by the court).[11]

These decisions require that in cases of doubt, an attorney should be disqualified from litigating against his former client. This rule is necessary because "[t]he stature of the profession and the courts, and the esteem in which they are held, are dependent upon the absence of even semblance of improper conduct." *Emle Industries, Inc.* v. *Patentex, Inc., supra,* at 575. Judges Frey and Walsh heeded these warnings and applied this rationale to the record facts:

> Any doubts as to whether Mr. Burbidge's former representation of Shell and Exxon is substantially related to the present suits must be resolved in favor of Shell and Exxon. . . . (C-9)

Reversal of the Ninth Circuit's decision is required to restore effect to the Canons of Ethics and to prevent their erosion. As recognized in *Empire Linotype School* v. *United States,* 143 F. Supp. 627, 633 (S.D.N.Y. 1956), "[w]ithout firm judicial support, the Canons of Ethics would be only reverberating generalities," *quoted with approval in Motor Mart, Inc.* v. *Saab*

[11] *Accord Hull* v. *Celanese Corp.,* 513 F.2d 568, 571 (2d Cir. 1975); *Allied Realty of St. Paul, Inc.* v. *Exchange National Bank of Chicago,* 408 F.2d 1099, 1101-1102 (8th Cir. 1969), *cert. denied,* 496 U.S. 823 (1969); *United States* v. *Trafficante,* 328 F.2d 117, 120 (5th Cir. 1964).

Motors, Inc., 359 F. Supp. 156 (S.D.N.Y. 1973). Absent reversal, the Ninth Circuit's opinion will have a chilling effect on the attorney-client relationship. Canon 4 is premised on the rationale that a client should be encouraged to reveal to his attorney all possibly pertinent information. *Richardson* v. *Hamilton International Corp., supra* at 1384. Yet, clients will be significantly deterred from confiding in their attorneys if they believe that confidences which they repose in their counsel may later be used against them with judicial approval.

B. The Court of Appeals Incorrectly Decided an Important Question Relating to the Conduct of Attorneys Which Has Not Been Settled by This Court

Judge Adams of the Third Circuit recently set forth the considerations which should guide district court judges in the exercise of their discretion in ruling on motions to disqualify opposing counsel:

> The trial judge should focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with cases. . . . Where a threshold quantum of similarity exists between the prior and current representations, courts must be scrupulous to ensure that even the appearance of impropriety is avoided. *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp., supra* at 760. (concurring opinion).

This procedure was followed meticulously by Judges Frey and Walsh in ruling on the motions to disqualify Mr. Burbidge and the Berman office from further participation in plaintiffs' litigation against petitioners.

Judges Frey and Walsh found that while associated with McCutchen, Mr. Burbidge had "access to con-

fidential information about Shell and Exxon's dealer relationships, marketing practices and antitrust suits." (C-7) Since "one of the central issues in both [the *Gas-A-Tron* and *Petrol Stops*] actions is the relationship between Shell and Exxon and their dealers" (C-3), Judges Frey and Walsh justifiably concluded that the pending suits were "substantially related" to the work Mr. Burbidge performed for Shell and Exxon while at McCutchen (C-5).

A lawyer should be disqualified from representing a party in litigation if he formerly represented an adverse party in a manner "substantially related" to the pending litigation.[12] Moreover, under circumstances such as present in this case, the disqualification of one lawyer in a firm generally constitutes disqualification of all other members of that firm. *Cinema 5, Ltd.* v. *Cinerama, Inc., et al.*, 528 F.2d 1384 (2d Cir. 1976); *Silver Chrysler Plymouth, Inc., supra; American Can Co.* v. *Citrus Feed Co., supra; Laskey Bros. of West Virginia* v. *Warner Bros. Pictures,* 224 F.2d 824 (2d Cir. 1975); Formal Opinions 169 (1937), 49 (1931), 33 (1931), and 16 (1929) of the American Bar Association Committee on Professional Ethics ("ABA Committee"); Informal Opinions 1336 (1975) and 906 (1966) of the ABA Committee; American Bar Association Disciplinary Rule 5-105(D). These principles were correctly applied by Judges Frey and Walsh to the facts presented to them in the affidavits and deposition testimony relating to this issue.

Mr. Burbidge was entrusted with and exposed to his client's confidences while an associate at McCutchen.

[12] *Silver Chrysler Plymouth, Inc., supra; Emle Industries, Inc., supra; American Can Co.* v. *Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971).

He attempted to settle a Shell dealer case (Wilson Dep. at 62-63) and was given considerable discretion in handling all of his assignments for Shell (*Id.* at 21). He discussed with another Exxon attorney its "procedures and practices in the marketing of gasoline and other products." (R. 132). These record facts were not disputed.

The District Court Judges' disqualification Order, which was supported by reference to these record facts, was overturned when the Ninth Circuit summarily concluded: "The record in this case does not support the district court's decision." (A-5) The panel's summary conclusion was contrary to the factual findings made by the trial judges on the extensive record before them. Rather than being grounded on the record, the panel's conclusion was referenced to two unrelated cases in which District Courts had refused to disqualify Mr. Burbidge from representing various plaintiffs against Shell. *Bonus Oil Co.* v. *American Petrofina Co.,* 1975-1 Trade Cas. ¶ 60,315 (D. Neb. 1975) is clearly distinguishable from both *Gas-A-Tron* and *Petrol Stops* by the fact that Shell does not market gasoline in Nebraska. Nonetheless, it is important that the court in *Bonus Oil Co.* observed that confidential information Mr. Burbidge received while working for Shell might be helpful in representing independent marketers in litigation against his former client. 1975-1 Trade Cas. ¶ 60,315 at 66,266. In the other case cited by the panel, the Tenth Circuit acknowledged ". . . indications at least of the existence of a conflict" between Mr. Burbidge's prior representation of Shell and his participation as a plaintiff's attorney against Shell. *In the Matter of Michael W. Graney,* 518 F.2d 311, 315 (10th Cir. 1975).

Thus, the Ninth Circuit committed clear legal error in overruling the District Judges' disqualification of Mr. Burbidge and the Berman office. Unless reversed, this erroneous holding will serve as a dangerous precedent allowing attorneys to change law firm affiliations and instantly use the confidences gained in representing a client in actively prosecuting litigation against his former client. The Ninth Circuit opinion condoning the Burbidge-Berman actions severely undermines the sanctity of the attorney-client relationship.

Further, this Court has long recognized that the court before which an action is pending has a great interest in maintaining the ethical standards of the members of its bar. *Ex parte Burr,* 9 Wheat (22 U.S.) 529, 6 L. Ed. 152 (1824). Therefore, the role of an appellate tribunal in reviewing a disqualification Order is a "limited one." *Silver Chrysler Plymouth, Inc., supra,* at 758.

Appellate courts should accord great deference to the factual findings of district court judges in such matters because: "the control of attorneys in trial litigation is within the supervisory powers of the trial judge," *Waters* v. *Western Co. of North America,* 436 F.2d 1072, 1073 (10th Cir. 1971). The trial court's exercise of its "very broad" discretion will not be overturned unless "clearly erroneous." *Accord, Hull, supra,* at 571; *Ceramco, Inc.* v. *Lee Pharmaceuticals,* 510 F.2d 268 (2d Cir. 1975); *Richardson, supra,* at 1386; *E. F. Hutton* v. *Brown,* 305 F. Supp. 371, 378 (S.D. Tex. 1969).

Thus, unless "no reasonable man would take the view adopted by the trial court," its rulings on matters of "discretion" should be upheld. *Delno* v. *Market St. Ry.,* 124 F.2d 965, 967 (9th Cir. 1942); *quoted with approval* in *Lindy Bros. Builders, Inc., of Phila., et al.* v. *American Radiator & Standard Sanitary Corp., et al.* (3d Cir., July 2, 1976) (*Slip Op.* at 19) ("*Lindy II*"). Where a district court goes "to great lengths to articulate the reasons for its decision" on a discretionary issue, significant weight should be given to its findings. *Lindy II* at 20.

In its initial opinion, the appeals panel acknowledged that substantial deference should be accorded the trial court's factual findings on matters relating to the conduct of attorneys in its courtroom (B-4). Yet, three months later, the same panel *sua sponte* reversed both its own and the District Judges' disqualification of Mr. Burbidge without justification. The first three pages of its four-and-one-half page substituted decision tracked *in haec verba* its earlier opinion affirming the disqualification of Mr. Burbidge. Without even a cursory analysis of the deliberate factual findings of the District Court, the panel summarily concluded that, "[t]he record in this case does not support the district court's decision" (A-5).

The appeals court's failure to support its reversal of the District Court Judges' findings is particularly disquieting in matters relating to legal ethics:

> Unless courts delineate the various policy considerations motivating their decisions, precedents offer little guidance to attorneys seeking to fulfill their ethical obligations. Note, *Disqualification of Attorneys For Representing Interests Adverse to Former Clients,* 64 Yale L.J. 917, 928 (1955).

By usurping the function of the trier of fact, particularly the detailed findings of two district court judges on the ethical issue of the disqualification of

counsel to appear in their court, the Ninth Circuit has established a dangerous precedent which should be reversed by this Court. This case offers this Court a compelling opportunity to exercise its responsibilities for ensuring the proper functioning of the federal judiciary and re-state the proper roles of trial and appellate courts in matters relating to the conduct of attorneys.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit and to reinstate the District Court's Order disqualifying the law office of Daniel L. Berman and all members or associates thereof from further participation in these cases so long as Shell or Exxon are defendants.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 29, 1976, Emil E. Melfi, Jr.
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Nos. 74-3287; 74-3288
GAS-A-TRON OF ARIZONA AND COINOCO,
Plaintiffs-Appellants,
v.
UNION OIL COMPANY OF CALIFORNIA, *et al.*,
Defendants-Appellees.

Nos. 74-3289; 74-3290
PETROL STOPS NORTHWEST,
Plaintiff-Appellant,
v.
CONTINENTAL OIL COMPANY, *et al.*,
Defendants-Appellees.

Order

Before: BROWNING and HUFSTEDLER, Circuit Judges, and RENFREW,* District Judge

The panel as constituted in the above cases *sua sponte* orders withdrawal of our prior per curiam opinion [Slip Op'n January 14, 1976] and substitutes therefor the revised opinion annexed hereto.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable Charles B. Renfrew, Northern District of California, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 29, 1976, Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals]

Nos. 74-3287; 74-3288

GAS-A-TRON OF ARIZONA AND COINOCO,
Plaintiffs-Appellants,
v.
UNION OIL COMPANY OF CALIFORNIA, ET AL.,
Defendants-Appellees.

Nos. 74-3289; 74-3290

PETROL STOPS NORTHWEST,
Plaintiff-Appellant,
v.
CONTINENTAL OIL COMPANY, ET AL.,
Defendants-Appellees.

Opinion

Consolidated Appeals from the United States District Court for the District of Arizona.

Before: BROWNING and HUFSTEDLER, Circuit Judges, and RENFREW,* District Judge

PER CURIAM:

The district court disqualified all lawyers in the firm of Berman and Giauque ("Berman") from representing the plaintiffs in these private antitrust actions brought against several major oil companies, including Shell Oil Company ("Shell") and Exxon Corporation ("Exxon"), for as long as these corporations were

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defendants.[1] Berman appeals. The disqualification order was based on the district court's conclusion that disqualification of the whole firm was necessary to prevent any appearance of impropriety that might result because Berman had hired a young associate who had previously worked for a large law firm that had represented Shell and Exxon in other cases.

Late in 1973, Berman filed these actions against Exxon, Shell and others claiming that they violated the antitrust laws in various respects in their relationship with their dealers and other marketers of refined petroleum products throughout the United States, with particular emphasis on the West Coast area. In February 1974, Berman hired Richard D. Burbidge as an associate. Mr. Burbidge had been employed by the Los Angeles firm of McCutchen, Black, Verleger & Shea ("McCutchen"), as an associate from August 1, 1972 until January 31, 1974. McCutchen had represented Shell and Exxon in a variety of matters, including some antitrust cases, over a period of many years. During his employment with McCutchen, Burbidge worked on four cases in which that firm represented Shell: (1) He spent 32 hours on an action against Shell filed by a manufacturer to recover the price of a storage tank delivered to Shell. (2) He spent 50.1 hours drafting pleadings and a memorandum in an unlawful detainer action by Shell against one of its dealers. (3) He logged 31.9 hours drafting motions to defeat an action against Shell by a landlord contending that Shell had failed to occupy a service station in violation of a lease provision. (4) He logged about

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19 hours formulating a settlement of an action against Shell by one of its former dealers who claimed that Shell had wrongfully terminated his dealership. Mr. Burbidge performed no services in any case on behalf of Exxon. However, he did represent a former Exxon employee in a slander action against the employee and Exxon in which Exxon paid the former employee's legal fees, including compensation for 38.9 hours that Mr. Burbidge noted on his time sheets. Mr. Burbidge also examined a memorandum filed in court by Exxon in support of its motion to dismiss a different class action. In short, Mr. Burbidge performed an assortment of tasks commonly handled by young associates in large law firms, and, among these, he worked on litigation directly and indirectly affecting cases that his firm undertook for Shell and Exxon.

The McCutchen firm retained a large volume of files relating to litigation and other matters that the firm had handled for Shell and Exxon over the years. It is undisputed that these files contained confidential material and that many lawyers in the McCutchen firm had personal knowledge of confidences received from Shell and Exxon. However, Mr. Burbidge flatly denied that he ever reviewed any of the files other than those in the cases earlier described, and he also denied that he received any confidential information from anyone about Shell and Exxon while he was employed by McCutchen. His testimony is uncontradicted.

We fully agree with the following principles stated by the Third Circuit in *Richardson v. Hamilton International Corp.*, 469 F.2d 1382 (1972):

> "Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety.
>
> "[T]he regulation of attorneys appearing before the district court in these matters will be disturbed only when, on review of the record, we can say that the district court abused its permissible discretion." [Footnotes omitted. 469 F.2d at 1385-86.]

We recognize that the primary responsibility for controlling the conduct of lawyers practicing before the district court lies with that court, and not with us. We will not disturb the district court's exercise of its discretion in fulfilling that responsibility if the record reveals any sound basis for its discretion disqualifying or refusing to disqualify a lawyer. The record in this case does not support the district court's decision. The district court's disqualification of Mr. Burbidge rested upon its determination that the pending litigation was "substantially related" to the matters in which he had previously represented Shell and Exxon while he was associated with McCutchen. Mr. Burbidge's situation was almost identical to that of the young associates whose claimed disqualification was considered in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975), *Redd v. Shell Oil Co.*, Civil No. C-104-71 (D. Utah, decided Sept. 2, 1974), reversed on other grounds *sub nom. In the Matter of Michael W. Garvey*, —— F.2d —— (10 Cir. 1975), and *Bonus Oil Co. v. American Petro-*

fina Co., No. CV-73-L-165 (D. Neb., decided May 1, 1975). In each case, the court decided that the associate was not disqualified because no substantial relationship existed between the pending litigation and the matters upon which he had worked for the client during his prior association. We agree with the reasoning in those cases. Here, as in those cases, the associate had not actually obtained any confidential information about either Shell or Exxon that would be relevant to the pending litigation,[2] and he had not worked on matters that were "substantially related" to the pending litigation.

We share the district court's concern for the appearance of impropriety. However, we are convinced that any initial inference of impropriety that arose from Mr. Burbidge's potential physical access to the files of Exxon and Shell and from his association with lawyers who did know confidential information about them was dispelled by evidence that he saw none of the files other than those relating to the cases assigned to him heretofore described and that he heard no confidences about Exxon and Shell from the lawyers with whom he was earlier associated.

Berman's disqualification was based solely on Mr. Burbidge's disqualification, and that disqualification vanishes with Mr. Burbidge's nondisqualification.

Reversed.

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[2] Unlike *Chugach Electric Ass'n* v. *United States District Court* (9th Cir. 1966) 370 F.2d 441, the record provides no basis for an inference that Mr. Burbidge gained any actual knowledge of the private affairs of Shell or Exxon that could have been used by him in these antitrust cases.

[Filed, Jan. 14, 1976; Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals]

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The McCutchen firm retained a large volume of files relating to litigation and other matters that the firm had handled for Shell and Exxon over the years. It is undisputed that these files contained confidential material and that many lawyers in the McCutchen firm had personal knowledge of confidences received from Shell and Exxon. However, Mr. Burbidge flatly denied that he ever reviewed any of the files other than those in the cases earlier described, and he also denied that he received any confidential information from anyone about Shell and Exxon while he was employed by McCutchen. His testimony is uncontradicted.

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> "Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to

examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety.

"[T]he regulation of attorneys appearing before the district court in these matters will be disturbed only when, on review of the record, we can say that the district court abused its permissible discretion." [Footnotes omitted. 469 F.2d at 1385-86.]

The district court did not exceed its discretion in ordering Mr. Burbidge's disqualification. Although nothing in the record casts any shadow on Mr. Burbidge's professional integrity or his good faith in resisting disqualification, the district court was within the bounds of its discretion in ordering his disqualification to prevent any appearance of impropriety. We cannot discount the district court's appropriate concern for the appearance of impropriety that can be caused when a lawyer, situated as was Mr. Burbidge, had physical access to a client's confidential information. Despite the lawyer's stout and uncontradicted protestation that he never glimpsed or heard any of that information, a client's doubt may linger and the appearance of impropriety may be undimmed.

However, the district court went afield in extending its appearance rationale to disqualify Berman. The litigation upon which Mr. Burbidge worked during his association with McCutchen was either entirely remote from this antitrust litigation or only peripherally related to the subject matter. Unlike *Chugach Electric Ass'n* v. *United States District Court,* 370 F.2d 441

(9th Cir. 1966), the record provides no basis for an inference that Mr. Burbidge gained any actual knowledge of the private affairs of Shell or Exxon that could have been used by him in these antitrust cases. *A fortiari,* there is no room for an inference that Berman might have acquired any confidential information from Mr. Burbidge. Unless we were willing to say that the law will imply an appearance of impropriety whenever a firm hires a lawyer whose association with his prior firm gave him physical access to confidential information that might be relevant to the new firm's action against the former employer's client, we cannot uphold the order disqualifying Berman. We are not willing to do so because we think that would be carrying appearances too far.

Affirmed in part, reversed in part and remanded for further proceedings consistent with the views herein expressed.

The parties shall bear their own costs on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 73-191-TUC-WCF

GAS-A-TRON OF ARIZONA AND COINOCO,
Plaintiffs,

vs.

UNION OIL COMPANY OF CALIFORNIA, *et al.*,
Defendants.

No. Civ. 73-212-TUC-JAW

PETROL STOPS NORTHWEST,
Plaintiff,

vs.

CONTINENTAL OIL CO., *et al.*,
Defendants.

Memorandum and Order

Defendants Shell Oil Company and Exxon Corporation have each moved to disqualify plaintiffs' attorneys from representing plaintiffs in these two cases pending in this Court, so long as Shell and Exxon are defendants. These cases were assigned to different judges and were consolidated for the hearing and disposition of such motions to disqualify some of the plaintiffs' attorneys, specifically Mr. Berman and all his partners and associates.

Plaintiffs filed a joint answering memorandum and Exxon and Shell filed a joint reply. The motions came on for hearing on April 29, 1974. Subsequently, on June 3, 1974, defense counsel filed a letter memorandum setting forth the amendment to the Code of Professional Responsibility of the American Bar Association. On June 7, 1974, plaintiffs' counsel responded with a letter memorandum. The matter is deemed submitted.

Defendants' motions contend that representation of the plaintiffs by the firm of Daniel L. Berman, with which Richard D. Burbidge is associated, constitutes a breach of Canons 4 and 9 of the Code of Professional Responsibility. The Disciplinary Rules under Canon 4 spell out the obligations of an attorney not to disclose the confidences and secrets of a former client. Canon 9 states that a lawyer should avoid even the *appearance* of professional impropriety.

Richard D. Burbidge was previously associated with the firm of McCutchen, Black, Verleger and Shea, a large Los Angeles law firm. Mr. Burbidge was a law clerk for the McCutchen firm from July, 1972 to December, 1972. He then became an associate and stayed with the firm until January 31, 1974, at which time Mr. Burbidge left to work for Mr. Berman's firm.

The McCutchen firm has represented Shell Oil in California for well over 40 years (Affidavit of Franklin H. Wilson). Until 1949 the McCutchen firm was general counsel for Shell on the West Coast and still maintains a close relationship with Shell. McCutchen is one of the three firms which handles substantially all of Shell's antitrust business (William G. Winters' deposition 8, 14). The firm functions as house counsel for Exxon and is only one of five law firms which represents Exxon in antitrust matters (Dillard W. Baker's deposition 43, 44, 9-10).

The relationship of Shell and Exxon with the McCutchen firm should have been known to Mr. Berman since his practice involves the representation of plaintiffs in private antitrust actions against the petroleum industry (Berman affidavit).

The complaints in both cases at hand charge the defendants with comprehensive and illegal conspiratorial and predatory conduct aimed at the suppression and elimination of independent marketers of gasoline. The

complaint in Petrol Stops charges that Shell and Exxon's contractual relations with their branded dealers are a part of the alleged conspiracy (Plaintiffs' Opposition Memorandum 5-7). Mr. Timms, a plaintiff in the Gas-A-Tron case makes the same allegation in his deposition. The Gas-A-Tron complaint alleges that the defendants discriminated in price by charging some dealers a higher price than others. Thus, one of the central issues in both actions is the relationship between Shell and Exxon and their dealers.

In the eighteen months that Mr. Burbidge worked for the McCutchen firm he was Shell's counsel in four cases. He also represented an Exxon employee; the time spent on this case was billed to Exxon.

Two of the four Shell cases involved the relationship between Shell and a dealer (*Shell Oil Company* v. *Abu-Hajar and Childers* v. *Shell Oil Company*). A third case, *Rosenfeld* v. *Shell Oil Company,* was an action brought by a Shell landlord alleging that Shell had breached a lease agreement.

Mr. Franklin H. Wilson, a partner in the McCutchen firm, testified that Mr. Burbidge had access to all of the Shell files in the McCutchen firm and that he could look at the files anytime he wanted (Wilson deposition 45-46, 67-68). Mr. Wilson stated that in order for Mr. Burbidge to adequately do the job he had been assigned in the dealer cases and landlord case he would have had to go through the McCutchen and Shell files in those cases. In addition, Mr. Burbidge would have had to talk about the cases with the people at Shell (Wilson deposition 67-68).

Mr. Wilson is quite sure he instructed Mr. Burbidge to look at the Lewis file when Mr. Burbidge was doing research on the Abu-Hajar case (Wilson deposition 44, 54). Two of the Lewis cases involved antitrust violations.

In addition, the Abu-Hajar case gave rise to an antitrust complaint to the Federal Trade Commission. The defendant in *Shell* v. *Abu-Hajar* complained to the commission that Shell's termination of its contract with him and his inability to obtain products from others was the result of a conspiracy among the oil companies to put the small businessman out of business (2nd Wilson affidavit). This appears to be the same claim made by plaintiffs in these cases. Although Mr. Burbidge may not have actually represented Shell with regard to the FTC complaint, he did represent Shell in the Abu-Hajar matters and had access to all the files.

Mr. Burbidge represented an Exxon employee in *Kinsey* v. *Humble Oil and Refining Co.* In the Kinsey case, Exxon counterclaimed against the plaintiff for interference with contractual relationships it had with the commission managers and interference with business relationships it had with wholesale and retail customers (Pugh affidavit).

The Kinsey case gave rise to a companion antitrust action, *Hines* v. *Humble Oil and Refining Co.*, brought in federal court. Kinsey, a former sales supervisor for Exxon, and approximately 20 dealers and commission managers of Exxon challenged the various marketing practices engaged in by Exxon. The deposition of Mr. Keith Pugh, counsel for Exxon confirms the fact that there were charges of both horizontal and vertical antitrust violations involved in the Hines case (Pugh deposition 50-53). Mr. Pugh stated that he had conversations with Mr. Burbidge in which they discussed the issues in the Hines and Kinsey cases. (Pugh deposition 52 and Pugh affidavit).

Finally, Mr. Fudge, a partner in the McCutchen firm, stated that at one time he referred Mr. Burbidge to a memorandum filed on behalf of Exxon in *Murdock* v. *Humble Oil and Refining Co.* The Murdock case was a

suit brought by a service station manager of Exxon on behalf of all Exxon managers in California, seeking the recovery of certain operating costs and expenses which the complaint alleged had been improperly charged against the manager's commission accounts. Mr. Burbidge had access to that entire file, which Mr. Fudge considered to contain confidential information (Fudge affidavit).

The burden on Shell and Exxon in this case is not to show that Mr. Burbidge actually received confidential information or that he disclosed or used such information. It is only necessary to show that the matters involved in the pending suit are substantially related to the matters or cause of action in which Mr. Burbidge previously represented Shell and Exxon, his former clients. *American Can Co.* v. *Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971). Under the rule as stated by the Third Circuit, all Exxon and Shell need show is that Mr. Burbidge might have acquired substantially related material. *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382 (3rd Cir. 1972).

It is clear that this Court cannot inquire into whether Mr. Burbidge actually received confidential information during his employment with the McCutchen firm:

> ". . . Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved. Thus, where 'it can reasonably be said that in the course of the former representation the attorney *might* have acquired information related to the subject matter of his subsequent representation,' . . .it is the court's duty to order the attorney disqualified." *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 577 (2nd Cir. 1973).

In *Chugach Electric Ass'n* v. *United States District Court for the District of Alaska,* 370 F.2d 441 (9th Cir. 1966), the Court held that disqualification of the attorney in that case was required. The Court stated that the secret and confidential information available to the disqualified attorney did not have to be specified. Such specification would entail disclosure of the very confidences the Canons seek to protect.

In Arizona Bar Grievance Committee Opinion No. 71-33, the Ethics Committee quoted from a previous opinion:

> "... A lawyer should not accept litigation against a former client under any circumstances, if such would result in conflict of interests or disclosure of confidences of the former client. In such a situation a court is justified in enjoining a lawyer from proceeding with the litigation against the former client."

The Committee goes on to say:

> "It is the honor of the legal profession that if fidelity to its clients can be depended upon, that a person may safely go to a lawyer and counsel with him upon personal and confidential matters with the absolute assurance that the lawyer's tongue is tied from ever divulging it, and a strict enforcement of this rule requires that an attorney, on terminating his employment, cannot thereafter act as counsel against his client in the same general matter, even though, while acting for his former client, he acquired no knowledge which could operate to the client's disadvantage in the subsequent, adverse employment ..."

Mr. Burbidge spent a considerable amount of time on Shell and Exxon matters. Although the exact nature of the information he received is unknown, it

is known that he had access to confidential information about Shell and Exxon's dealer relationships, marketing practices and antitrust suits.

This Court cannot permit Mr. Burbidge to place himself in a position where, even unconsciously, he will be tempted, or it appears to the public and his former clients that he might be tempted, in the interests of his new clients, to take advantages of information derived from confidences placed in him by Shell and Exxon. See, *T. C. Theatre Corp* v. *Warner Bros. Pictures,* 113 F.Supp. 365 (S.D. N.Y. 1953); *Richardson* v. *Hamilton International Corp., supra.*

It is well established that the law firm with which the disqualified attorney is associated is also disqualified from representing interests adverse to the former clients. *Opinion No. 71-33, supra; Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.,* 216 F.2d 920 (2nd Cir. 1954); *American Can Co.* v. *Citrus Feed Co., supra.* The rationale behind this rule is that there is imputation of the knowledge and insights of the former client's affairs gained by the disqualified attorney, to all partners and employees of the law firm with which he is presently associated. Thus, the Berman law firm must be disqualified from representing plaintiffs against Exxon and Shell if Mr. Burbidge is disqualified.

Without making a thorough investigation of the potential conflict betwen Mr. Burbidge's past and proposed employment, Mr. Berman hired Mr. Burbidge away from the McCutchen firm with the knowledge that he had been working for Shell and Exxon. There is nothing in the record to show that Mr. Berman at any time prior to hiring Mr. Burbidge, consulted anyone in the McCutchen firm about the proposed hiring. It appears that neither Mr. Berman nor Mr. Burbidge ever discussed with anyone, in either the McCutchen firm or any of the attorneys for de-

fendants Exxon and Shell in these cases, the possibility of a conflict with respect to Mr. Berman's hiring or anticipated hiring of Mr. Burbidge, or with respect to the propriety thereof. These lawsuits were then pending and Mr. Berman only saw fit to question Mr. Burbidge after the issue was raised by Mr. Norris, counsel for Exxon, during the deposition of Mr. Timms in one of these cases. Mr. Burbidge was a member of the McCutchen firm while the instant suits were in progress. Mr. Berman had to know that. Yet, within eight days after having been hired away from the McCutchen firm, Mr. Burbidge was actively participating in these suits against his former clients, Shell and Exxon. Mr. Berman would excuse the apparent conflict and impropriety involved here on the grounds that Mr. Burbidge was only a "junior associate". The law and the canons seem to make no such distinction. Both Mr. Berman and Mr. Burbidge had a duty under the circumstances to make full, prior inquiry into the possible conflict and impropriety of their proposed relationship and a full disclosure of their planned relationship to the McCutchen firm and to the attorneys for Exxon and Shell in these cases. The spirit if not the letter of the law and the canons relating to professional conduct seem to require this. Then any questions about the propriety of the representation can be resolved before there is a public dispute about it.

The record in this case discloses that while Mr. Burbidge was with the McCutchen firm he was employed in representing defendants Shell and Exxon in matters which are substantially related to those involved in these cases and had access to files which contained confidential information. It appears that Mr. Burbidge, at the very least, had access to material while engaged as an attorney for Shell and Exxon

which could be helpful to his present clients and harmful to his former clients.

Any doubts as to whether Mr. Burbidge's former representation of Shell and Exxon is substantially related to the present suits must be resolved in favor of Shell and Exxon and the Berman firm must be disqualified. *Fairchild Sanding Disc & Manufacturing Co., Inc.* v. *Taylor,* CIV No. 7211-102(R), February 22, 1974.

The Courts as well as the bar have a responsibility to maintain public confidence in the legal profession. This means that a Court may disqualify an attorney not only for acting improperly but also for failing to avoid the appearance of impropriety. *Richardson* v. *Hamilton International Corp., supra.*

For the above stated reasons this Court concludes that the Daniel L. Berman law firm should be disqualified.

IT IS ORDERED that the defendants' Shell and Exxon Motion to Disqualify, is granted. The law firm of Daniel L. Berman and all members or associates thereof are disqualified from participating in any way in these actions so long as the cases involve Shell or Exxon.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Memorandum and Order to all counsel of record.

DATED this 27th day of August, 1974.

/s/ JAMES A. WALSH
James A. Walsh
United States District Judge

/s/ WILLIAM C. FREY
William C. Frey
United States District Judge

Supreme Court, U. S.
FILED
AUG 30 1976
MICHAEL RODAK, JR., CLERK

No. 76-139

In the

Supreme Court of the United States

October Term, 1976

SHELL OIL COMPANY and EXXON CORPORATION,
Petitioners,

vs.

GAS-A-TRON OF ARIZONA and COINOCO,
Respondents,

and

SHELL OIL COMPANY and EXXON CORPORATION,
Petitioners,

vs.

PETROL STOPS NORTHWEST,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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B. There is no important question of law raised in petitioners' brief. 16

C. The decision of the Ninth Circuit reasonably and correctly applied the generally accepted standards for attorney disqualification in a situation of alleged conflict in representation and comports with the Second Circuit's opinion in a factually similar case, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975). 18

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Canon 1 4

Canon 4 ..... 4, 16

Canon 9 ..... 4, 16

Federal Rules of Civil Procedure

Rule 7 ..... 5, 9

Rule 11 ..... 5, 9

No. 76-139

In the

Supreme Court of the United States

October Term, 1976

SHELL OIL COMPANY and EXXON CORPORATION,
Petitioners,

vs.

GAS-A-TRON OF ARIZONA and COINOCO,
Respondents,

and

SHELL OIL COMPANY and EXXON CORPORATION,
Petitioners,

vs.

PETROL STOPS NORTHWEST,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents, Gas-A-Tron of Arizona and Coinoco ("Gas-A-Tron") and Petrol Stops Northwest ("Petrol Stops"), respectfully pray that the Petition for Writ of Certicrari of Shell Oil Company ("Shell") and Exxon Corporation ("Exxon") to review the Ninth Circuit's repeated orders denying disqualification of the respondent's attorneys on the same grounds and for the same reasons that identical motions filed by Shell against respondents'

attorneys were denied by two other courts, the United States District Courts for Utah (affirmed by the Tenth Circuit Court of Appeals) and Nebraska[1], be denied.

The United States Court of Appeals for the Ninth Circuit[2] on January 14, 1976, entered its order reversing an opinion of the United States District Court for the District of Arizona, unofficially reported at 1974-2 Trade Cas. ¶ 75,225 (D. Ariz. 1974). The Arizona district court's opinion was in conflict with the decisions of two other district courts and the United States Court of Appeals for the Tenth Circuit. Respondents filed a petition for rehearing *en banc* that was denied April 29, 1975, and the United States Court of Appeals for the Ninth Circuit filed a new opinion[3] again reversing the Arizona district court and finding in accord with all the other courts that have considered this matter, except the Arizona court, that there was no evidence whatsoever in the record justifying the disqualification of respondents' counsel.

On May 12, 1976, Shell filed a second petition, a "Suggestion for Rehearing *En Banc*", that was denied by order of the court dated July 6, 1976. Shell then filed a motion to stay the issuance of the Mandate that was denied on July 16, 1976, and then, in a further effort to delay a case in which discovery has been stayed for two years, Shell filed a petition for reconsideration of the Ninth Circuit's Order refusing to stay the Mandate. This second petition was likewise denied, and Shell and Exxon have now petitioned this Court for a Writ of Certiorari to review an

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[1] *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,392 (D. Utah 1974); *In re Michael W. Graney*, 518 F.2d 311 (10th Cir. 1975); *Bonus Oil Co. v. American Petrofina Co.*, 1975-1 Trade Cas. ¶ 60,315 (D. Neb. 1975).

[2] The panel was comprised of Circuit Judges Browning and Hufstedler and District Judge Renfrew (sitting by designation).

[3] The opinion of the Ninth Circuit is unofficially reported at 1976-1 Trade Cas. ¶ 60,862 (9th Cir. 1976).

opinion that is in accord with the opinions of three other courts and in accord with the Second Circuit's leading opinion on the subject of attorney disqualification in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation*, 518 F.2d 751 (2d Cir. 1975).

OPINIONS BELOW

Petitioners filed motions to disqualify respondents' attorneys, the law firm of Daniel L. Berman ("Berman Office"), in three district courts where respondents' counsel represented plaintiffs in antitrust actions against the petitioners. Two district courts denied petitioner Shell's motions to disqualify respondents' attorneys in two of these cases, all based on the identical factual situation. *Bonus Oil Co. v. American Petrofina Co.*, 1975-1 Trade Cas. ¶ 60,315 (D. Neb. 1975) and *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,392 (D. Utah 1974). The latter order denying disqualification was affirmed by the Tenth Circuit Court of Appeals in *In re Michael W. Graney*, 518 F.2d 311 (10th Cir. 1975).

One Court, the United States District Court for the District of Arizona granted petitioners' motion. This petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is from the Ninth Circuit's opinion reversing that District Court. The Ninth Circuit Court of Appeals issued two orders reversing the United States District Court for the District of Arizona's order disqualifying respondents' counsel. *Gas-A-Tron of Arizona and Coinoco v. Union Oil Co. of California, et al.* (Nos. 74-3287, 74-3288) ("*Gas-A-Tron*"); *Petrol Stops Northwest v. Continental Oil Co., et al.* (Nos. 74-3289, 74-3290) ("*Petrol Stops*"), unofficially reported at 1976-1 Trade Cas. ¶ 60,862 (9th Cir. 1976). The initial opinion of the Ninth Circuit in *Gas-A-Tron* and *Petrol Stops* is

unofficially reported at 1976-1 Trade Cas. ¶ 60,689 (9th Cir. 1976). The memorandum and order entered by the United States District Court for the District of Arizona in these cases is unofficially reported at 1974-2 Trade Cas. ¶ 75,225 (D. Ariz. 1974).

QUESTIONS PRESENTED

1. Whether this Court should review a ruling of the Court of Appeals for the Ninth Circuit clearly within the mainstream of judicial decisions regarding questions of professional responsibility, refusing to disqualify an attorney or his law firm from handling an action on the basis of suspicion or conjecture without any evidentiary foundation supporting a claim of impropriety.

2. Whether this Court should review a ruling of the Court of Appeals for the Ninth Circuit in full accord with the rulings of three other courts upon the identical issues.

3. Whether this Court should review a ruling of the Court of Appeals for the Ninth Circuit that turned upon the particular facts of the matter before the Court of Appeals and has no significant effect beyond its immediate impact upon the parties before that court.

CANONS INVOLVED

This Brief and the Petition to which it responds involve Canons 1, 4 and 9 of the Code of Professional Responsibility of the American Bar Association, and these Canons are printed in Appendix B to this Brief.

STATEMENT OF THE CASE

The law office of Daniel L. Berman has over the past ten years represented small independent marketers of refined petroleum products in numerous actions against certain major oil companies, including the petitioners Shell and Exxon.

A. *Shell's and Exxon's Motions to Disqualify.*

In the four private antitrust actions against major oil companies, including the cases that are the subjects of the petition to this Court, being handled by the Berman office in 1974, Shell and Exxon filed motions to disqualify plaintiffs' counsel. The first of these actions, *Redd v. Shell Oil Co.*, Civil No. C-104-71 (D. Utah), was filed on May 18, 1971, and trial was set to commence on July 12, 1974, two days after Shell filed a motion to disqualify the Berman office from representing the plaintiff in that action. The court summarily dismissed Shell's motion as meritless and untimely and imposed sanctions on Shell's counsel pursuant to Rules 7 and 11 of the Federal Rules of Civil Procedure. *See Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,392 (D. Utah 1974). The Tenth Circuit Court of Appeals affirmed the denial of Shell's motion to disqualify, finding that Shell's counsel's justification for filing the motion was "far-fetched." *In re Michael W. Graney*, 518 F.2d 311, 315 (10th Cir. 1975).

The United States District Court for the District of Nebraska considered the same motion to disqualify the law office of Daniel L. Berman from representing the plaintiff in *Bonus Oil Co. v. American Petrofina Co.*, Civil No. CV 73-L-165 (D. Neb, filed April 27, 1973). The Nebraska district court also denied Shell's motion to disqualify, finding that there was no evidence in the record before it upon the basis of which that court could find a conflict of interest justifying the disqualification of the Berman office. *See Bonus Oil Co. v. American Petrofina Co.*, 1975-1 Trade Cas. ¶ 60,315 (D. Neb. 1975).

In both the *Redd* and *Bonus* cases, Shell filed the same memoranda and supporting affidavits that it filed in the Tucson actions. The same facts were before the Ninth Circuit Court of Appeals as were considered by the United States District Courts for the Districts of Utah and Nebraska and by the Tenth Circuit. The Ninth Circuit's opinions were in harmony with the opinions of those three other courts. Only the memorandum and order of the United States District Court for the District of Arizona found that disqualification was warranted, and that court effectively held that disqualification of plaintiffs' attorneys could be based on speculation and conjecture, without supporting evidence, and, in fact, contrary to the uncontroverted record. This premise was rejected by the Ninth Circuit, as it had been rejected by the Utah and Nebraska district courts and the Tenth Circuit.

The motion to disqualify that is the subject of this petition was filed by the law firm of Howrey, Simon, Baker & Murchison of Washington, D.C., counsel for the Shell Oil Company, and by Robert L. Norris, counsel for Exxon Corporation. The motion asserted that respondents' counsel were subject to disqualification under Canons 4 and 9 of the American Bar Association Code of Professional Responsibility. The motion for disqualification related solely to the employment by the Berman office of Richard D. Burbidge, a young attorney recently graduated from the University of Utah, College of Law. Upon graduation, Mr. Burbidge became associated with the McCutchen, Black, Verleger & Shea ("McCutchen") law firm in Los Angeles. He remained with the McCutchen firm for 18 months, and on February 4, 1974, he returned to Utah and became associated with the Berman office. The McCutchen firm never represented Shell or Exxon in the *Gas-A-Tron* or *Petrol Stops* actions. Since joining the Berman office,

contrary to assertions contained in Shell's petition[4], Mr. Burbidge has not participated in the prosecution of the *Gas-A-Tron* and *Petrol Stops* actions other than to be present at one deposition along with Mr. Berman and to oppose these motions to disqualify.

Prior to Mr. Burbidge's employment by the Berman office, Mr. Berman investigated with Mr. Burbidge the possibility of any conflict of interest. (R. at 232-33, 246-47, 257-58.)[5] In addition, Mr. Burbidge discussed with Mr. Wilson, the partner at the McCutchen office for whom he worked on Shell matters, his intended employment with the Berman office, and Mr. Wilson did not claim any potential conflicts of interest. (Wilson Depo. at 21-23).

During the time that Mr. Burbidge was an associate at the McCutchen firm, he never represented Exxon, nor was he involved in any case handled by the McCutchen office in which the McCutchen office represented Exxon. (R. at 232-33, 246-47, 257-58.) During Mr. Burbidge's 18 month association with the McCutchen firm, he devoted approximately 140 hours to four matters in which the McCutchen firm represented Shell Oil Company. Each of these matters was a civil action filed in the state courts of California. None of these actions were antitrust actions or in any way involved claims of anticompetitive conduct against Shell Oil Company. The subject matter of these

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[4]Shell and Exxon blatantly misstate the record in these actions when they state in their Brief that, "The record demonstrated that Mr. Berman had assigned Mr. Burbidge to prosecute this action against his former Clients, Shell and Exxon, as soon as the 'hiring away' process was completed." (Petitioners' Brief at 6.) The record is clear that Douglas J. Parry handled almost all of the *Gas-A-Tron* and *Petrol Stops* matters as well as the work in the *Bonus Oil* case, also against Shell. In *Redd*, the other antitrust lawsuit involving Shell in the Berman office, Mr. Berman himself and Stephen G. Crockett performed the necessary work. Mr. Burbidge has never done any substantial work in relation to any of the antitrust actions against Shell or Exxon handled by the Berman law firm beyond opposing the four motions for disqualification.

[5]All "R" references are to the record on appeal that petitioners have requested the Ninth Circuit Clerk's office to deliver to this Court.

actions did not substantially relate to the issues raised in *Gas-A-Tron* or *Petrol Stops* or in *Redd* or *Bonus*. *See Gas-A-Tron of Arizona v. Union Oil Co.*, 1976-1 Trade Cas. ¶ 60,862, at 68,780 (9th Cir. 1976); *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,392, at 98,273-98,274 (D. Utah 1974); *Bonus Oil Co. v. American Petrofina Co.*, 1975-1 Trade Cas. ¶ 60,315, at 66,266 (D. Neb. 1975).

Mr. Burbidge spent 32 hours working under a senior partner on *Futura Titanium v. Shell Oil Company*, a lawsuit brought by a manufacturer of a Titanium tank against Shell after Shell refused to accept or pay for the tank.

Mr. Burbidge spent 31.9 hours on *Rosenfeld v. Shell Oil Company*, a lawsuit filed by a landlord of a Shell service station site. The landlord in that case claimed that Shell failed to occupy the station continuously, in violation of its lease, and as a result of Shell's vacating the premises, a zoning problem was created.

Mr. Burbidge worked for 19.8 hours on *Childers v. Shell Oil Company*, a lawsuit by a Shell dealer against Shell for wrongful termination of a dealership. The lawsuit involved no antitrust allegations. Mr. Burbidge's involvement in that case was limited to formulating a plan for purchasing the claim in bankruptcy and attending a hearing on the sale of the claim in bankruptcy.

Finally, Mr. Burbidge spent 50.1 hours on an unlawful detainer action brought by Shell against one of its dealers, *Shell Oil Company v. Abu-Hajar*.

Aside from Mr. Burbidge's work on these four matters, there was nothing in the record before the district court aside from pure speculation, uncontrovertedly denied, that Mr. Burbidge might have, during his employment at McCutchen, wandered through other Shell files stored somewhere in the McCutchen office, to support a claim that Mr. Burbidge had obtained confidences involving Shell.

In support of their motions to disqualify, petitioners refused to provide for the district court any records that would have shown what Mr. Burbidge actually did while employed by McCutchen, even though these records, including Mr. Burbidge's time records and the pleadings in the cases on which he worked, were in petitioners' possession or under their control. In fact, at a later hearing, Shell's attorney who signed the motion to disqualify pursuant to Rules 7 and 11 of the Federal Rules of Civil Procedure, admitted that he had not even made a minimal investigation to determine whether Mr. Burbidge actually received or was exposed to confidences or secrets of the petitioners or worked upon matters that were substantially related to the issues in these cases. *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,392, at 98,275-98,276 (D. Utah 1974). In fact, the United States District Court for the District of Utah found that the affidavits sponsored by petitioner Shell "deliberately fail to disclose the whole truth regarding Mr. Burbidge's association with the McCutchen office and deliberately misrepresent the nature of that association." *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,392, at 98,274 (D. Utah 1974). The record in *Redd* was a xerox copy of the record filed by Shell in support of its motion to disqualify respondents' counsel in *Gas-A-Tron* and *Petrol Stops*.

Except in the United States District Court for the District of Arizona, the courts that have considered the issue have uniformly found that disqualification of the Berman office as a result of the hiring of Richard Burbidge was not warranted. Mr. Burbidge never received nor was he

exposed to any confidences, secrets or information of the Shell Oil Company relating to the claims or issues in *Gas-A-Tron or Petrol Stops.* (*Gas-A-Tron of Arizona and Coinoco v. Union Oil Co. of California, et al.*, and *Petrol Stops Northwest v. Continental Oil Co., et. al.*, 1976-1 Trade Cas. ¶ 60,862 (9th Cir. 1976).)

B. *District Court's Ruling.*

After a consolidated hearing of Exxon's and Shell's motions, the district court disqualified Daniel L. Berman's law firm from participating in any way in the *Gas-A-Tron* and *Petrol Stops* actions as long as Exxon and Shell were involved. *Gas-A-Tron of Arizona v. Union Oil Co.*, 1974-2 Trade Cas. ¶ 75,225, at 97,522 (D. Ariz. 1974). Central to the district court's ruling was the notion that Mr. Burbidge's disqualification was required by the fact that the McCutchen firm retained confidential materials of Shell and Exxon in its files, and Mr. Burbidge "had access to all the files." *Id.* at 97,520. Mr. Burbidge's working in the same offices in which confidential information regarding Shell and Exxon may have been stored was enough in the eyes of the district court to disqualify him and his new firm from subsequently representing parties in any matter against Shell or Exxon even though there was no showing that the supposed confidential information stored in the files of McCutchen was substantially related to the issues in the present actions, and with the uncontroverted record establishing that Mr. Burbidge had not looked at those files. Thus, the district court's ruling was based on suspicions and speculations without any specific evidentiary foundation regarding what confidences of Shell and Exxon Mr. Burbidge might have gleaned during the brief period of his employment at McCutchen.

C. *The Ninth Circuit's Opinions.*

Respondents appealed the district court's order of disqualification to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the district court's disqualification of Mr. Berman's law firm other than Mr. Burbidge. Finding that there was no evidence in the record before it to suggest that Mr. Berman's law firm had acquired confidential information substantially related to the issues involved in the *Gas-A-Tron* and *Petrol Stops* lawsuits through the association of Mr. Burbidge, the Court of Appeals found no grounds upon which to justify the disqualification of the Berman law firm.

> The record provides no basis for an inference that Mr. Burbidge gained any actual knowledge of the private affairs of Shell or Exxon that could have been used by him in these antitrust cases. *A fortiori*, there is no room for an inference that Berman might have acquired any confidential information from Mr. Burbidge. Unless we were willing to say that the law will imply an appearance of impropriety whenever a firm hires a lawyer whose association with his prior firm gave him physical access to confidential information that might be relevant to the new firm's action against the former employer's client, we cannot uphold the order disqualifying Berman. We are not willing to do so because we think that would be carrying appearances too far. *Gas-A-Tron of Arizona v. Union Oil Co.*, 1976-1 Trade Cas. ¶ 60,689, at 67,994 (9th Cir. 1976).

However, in its first opinion, the Court of Appeals upheld the district court's disqualification of Mr. Burbidge individually from prosecuting the *Gas-A-Tron* and *Petrol Stops* actions on the basis of a concern for the possible appearance of impropriety resulting from Mr. Burbidge previously working for a firm that had represented Shell and Exxon from time to time. *Id.*

Shell and Exxon requested reconsideration of the Court of Appeals' order. The court subsequently denied Shell and Exxon's request for rehearing and withdrew its initial opinion, substituting an opinion overruling the district court's disqualification order in its entirety. *Gas-A-Tron of Arizona v. Union Oil Co.*, 1976-1 Trade Cas. ¶ 60,862, at 68,779-68,780 (9th Cir. 1976). The court explained that in reconsidering the appeal, it found no basis for disqualifying Mr. Burbidge. The Ninth Circuit found that during the course of Mr. Burbidge's employment at McCutchen, Mr. Burbidge had neither obtained any confidential information about Shell or Exxon relevant to the *Gas-A-Tron* and *Petrol Stops* lawsuits nor worked on any matters substantially related to the issues raised in those lawsuits. Accordingly, the Ninth Circuit Court of Appeals held that neither Mr. Burbidge nor the members and associates of the law firm he had joined since leaving McCutchen should be disqualified from prosecuting the *Gas-A-Tron* and *Petrol Stops* actions. *Id.*

REASONS FOR DENYING THE WRIT

A. *The opinion of the Ninth Circuit Court of Appeals is in accord with the decisions of the Tenth Circuit Court of Appeals and of the United States District Courts for Utah and Nebraska with regard to identical motions to disqualify Mr. Berman and Mr. Burbidge filed by the petitioner Shell.*

Prior to the decision of the Ninth Circuit Court of Appeals four other courts had addressed the identical issues raised in petitioners' brief in ruling on motions to disqualify Mr. Burbidge and the Daniel L. Berman law firm. *See In re Michael W. Graney*, 518 F.2d 311 (10th Cir. 1975); *Bonus Oil Co. v. American Petrofina Co.*, 1975-1 Trade Cas. ¶ 60,315 (D. Neb. 1975); *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,392 (D. Utah 1974); and the consolidated *Gas-A-Tron* and *Petrol Stops* cases in the United States District Court for the District of Arizona. In each case, the court was faced with a motion to disqualify Mr. Burbidge and the Berman law firm in an antitrust action involving major oil companies, based on alleged implications of impropriety arising from Mr. Burbidge's prior association with McCutchen. In fact, the records before the courts in *Gas-A-Tron*, *Petrol Stops*, *Redd* and *Bonus* were virtually identical, with many of the same affidavits, depositions and memoranda filed in all four cases. Yet, only the district court in Tucson, on the basis of its suspicions and surmises without evidentiary support, held that disqualification was warranted.

In *Redd*, the United States District Court for the District of Utah held petitioner Shell's motion for disqualification to be wholly without merit, finding that "[t]he record in support of the motion for disqualification did not disclose any foundation from which a good faith contention could be made that there was a substantial relationship between the Shell matters on which Mr. Burbidge worked at the McCutchen office and the *Redd* action." *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,392, at 98,277 (D. Utah 1974). In addition, the court fined Shell's attorney, Michael W. Graney (the same attorney who filed the disqualification motions in Tucson), $5,000 for willfully sponsoring a meritless and untimely motion to disqualify his adversary's counsel in violation of the duty imposed by Rules 7 and 11 of the Federal Rules of Civil Procedure. *Id.* at 98,279.

In re Michael W. Graney, 518 F.2d 311 (10th Cir. 1975) was the Tenth Circuit's decision on Shell's appeal of the *Redd* order. While the Tenth Circuit eliminated the fine imposed by the district court on Mr. Graney,

the court held that his motion for disqualification should have been summarily rejected by the district court, and that Mr. Graney should have been reprimanded for filing it. *Id.* at 316.

In *Bonus Oil Co. v. American Petrofina Co.*, 1975-1 Trade Cas. ¶ 60,315 (D. Neb. 1975), the United States District Court for the District of Nebraska denied petitioner Shell's motion to disqualify Mr. Burbidge and the Berman law firm on the basis that there was no persuasive evidence before it to indicate that during his employment at McCutchen, Mr. Burbidge was exposed to client confidences of Shell that might be relevant to issues raised in the pending lawsuit. *Id.* at 66,267. Thus, the Ninth Circuit did not break new ground in its decision overturning the district court's order of disqualification. In fact, it eliminated an aberration among decisions resolving precisely the same issues.

The Ninth Circuit's decision in *Gas-A-Tron* and *Petrol Stops*, as well as the courts' decisions in *Redd*, *Graney* and *Bonus*, properly analyzed the operative facts and correctly applied legal principles in refusing to disqualify the Berman office from representing the respondents in actions against Shell and Exxon. The opinions of the Ninth and Tenth Circuits and of the Utah and Nebraska district courts do not wander into vague areas of conjecture on a suspicion of impropriety but are instead based upon the facts of record and the conclusions that could rationally be drawn from them.

When the question of attorney disqualification has arisen, the federal courts have uniformly adopted the rule that an attorney should be disqualified from representing a party in an action against a former client only if the prior representation involved matters with regard

to the former client that are substantially related to the present action. That rule was originally set forth in *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953):

> [W]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.

See, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975); *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *Chugach Elec. Ass'n v. United States Dist. Ct.*, 370 F.2d 441 (9th Cir. 1967); *Consolidated Theatres v. Warner Bros. Cir. Management Corp.*, 216 F.2d 920, 924 (2d Cir. 1954). Corollary to that rule is the principle that in the absence of a substantial relationship between the subject matter of a prior representation and a current adverse representation, disqualification is unwarranted.

Mr. Burbidge and the Berman law firm have proved to the satisfaction of four courts that no confidences of Shell or Exxon related in any way to his work with Mr. Berman had been disclosed to Mr. Burbidge during his tenure at McCutchen. In light of the absence of evidence in the record presented in support of Shell's and Exxon's motions to disqualify of any foundation upon which a good faith contention of conflict of interest or impropriety could be made, the rulings of those courts are clearly sound. Discovery in these actions has already been delayed for more than two years. Further review of the same issues by this Court would be superfluous.

B. *There is no important question of law raised in petitioners' brief.*

The Ninth Circuit Court of Appeals in reversing the Arizona District Court applied the same principles of law universally applied by courts considering alleged violations of Canons 4 and 9 of the Code of Professional Responsibility. In applying the "substantial relation" test, courts have rejected a standard of suspicion in ruling on questions of attorney impropriety. *See, e.g., American Can Co. v. Jack Daniel Distillery,* 454 F.2d 442 (9th Cir. 1972); *Chugach Elec. Ass'n v. United States Dist. Ct.,* 370 F.2d 441, 443 (9th Cir. 1967); *Consolidated Theatres v. Warner Bros. Cir. Management Corp.,* 216 F.2d 920, 924-25, 927 (2d Cir. 1954); *Redd v. Shell Oil Co.,* 1974-2 Trade Cas. ¶ 75,392 (D. Utah 1974); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.,* 370 F. Supp. 581 (E.D.N.Y. 1973); *T.C. Theatre Corp. v. Warner Bros. Cir. Management Corp.,* 113 F. Supp. 265, 271 (S.D.N.Y. 1953). In each case of disqualification, there has been evidence that the attorney's current adverse representations involved claims either substantially related to or the same as claims concerned in prior representations, or that the attorney had actually received confidences or secrets of his former client substantially related to the present adverse representation. *See, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.,* 518 F.2d 751 (2d Cir. 1975); *Hull v. Celanese Corp.,* 513 F.2d 568 (2d Cir. 1975); *General Motors Corp. v. City of New York,* 501 F.2d 639 (2d Cir. 1974); *Emle Industries, Inc. v. Patentex, Inc.,* 478 F.2d 562 (2d Cir. 1973); *Richardson v. Hamilton Int'l Corp.,* 469 F.2d 1382 (3d Cir. 1972), *cert. denied,* 411 U.S. 986 (1973); *American Can Co. v. Jack Daniel Distillery,* 454 F.2d 442 (9th Cir. 1972); *Chugach Elec. Ass'n v. United States Dist. Ct.,* 370 F.2d 441 (9th Cir. 1966); *Consolidated Theatres v. Warner Bros. Cir. Management Corp.,* 216 F.2d 920 (2d Cir. 1954).

In *Gas-A-Tron* and *Petrol Stops,* the Ninth Circuit Court of Appeals had no evidence before it indicating that Mr. Burbidge had done any work on matters related in any way to his work with the Berman firm or that confidential information had been disclosed to Mr. Burbidge while he was employed at McCutchen even remotely relevant to the issues raised in *Gas-A-Tron* or *Petrol Stops.* The Ninth Circuit thus had no basis in the record before it for disqualifying Mr. Burbidge and the Berman law firm, and its decision overturning the district court's order of disqualification was unquestionably correct.

In relation to the Ninth Circuit's opinion in *Gas-A-Tron* and *Petrol Stops,* all parties are agreed on the standards that must be applied on a motion to disqualify and upon subsequent review of the court's ruling. The respondents fully subscribe to the statement of the rule in petitioners' brief that, "a lawyer should be disqualified from representing a party in litigation if he formerly represented an adverse party in a manner (sic) 'substantially related' to the pending litigation." (Petitioners' Brief at 12.) The only dispute between the parties is the application of that standard under the specific factual situation presented by respondents' representation by the Berman law firm in the *Gas-A-Tron* and *Petrol Stops* antitrust actions.

This Court is confronted with an issue that is vital to the respondents in determining whether they will be allowed to proceed in their antitrust actions with the counsel of their choice. The issue is likewise extremely significant in terms of the reputations and freedom of action of Mr. Burbidge and of the Berman law firm. The petitioners are concerned with fostering the delays occasioned by disqualification of their adversaries' counsel. However, beyond the relatively narrow interests of the

parties to this matter, this Court's review of the Ninth Circuit's ruling would have no great significance.

The question of disqualification disputed in these cases must be determined on the basis of the unique factual situation presented by Mr. Burbidge's transfer of employment from McCutchen to Berman. The standards governing the disposition of the disqualification issue are not a subject of controversy among the parties and, indeed, have been consistently applied by all courts that have finally considered this matter. Resolution of the narrow factual issue raised by petitioners' brief can provide no judicial guidelines of more than the most strictly limited application, especially since all courts are now in agreement. The Ninth Circuit's ruling in *Gas-A-Tron* and *Petrol Stops* is thus inappropriate for this Court's review.

C. *The decision of the Ninth Circuit reasonably and correctly applied the generally accepted standards for attorney disqualification in a situation of alleged conflict in representation and comports with the Second Circuit's opinion in a factually similar case, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975).

Under factual circumstances closely analogous to those confronted by the Ninth Circuit in *Gas-A-Tron* and *Petrol Stops*, the United States Court of Appeals for the Second Circuit, in *Silver Chrysler Plymouth, Inc. vs. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975) (a copy of this opinion is attached hereto as Appendix A), reached the same result in refusing to disqualify an attorney from prosecuting an action against Chrysler Motors Corporation, a long-standing client on retainer of the law firm with which the attorney was formerly associated upon graduating from law school. In *Silver*, the Second Circuit recognized the potential conflict arising between "an individual's right to his own freely chosen counsel and the

need to maintain the highest ethical standards of professional responsibility." *Id.* at 753. However, after a thorough investigation and analysis of the matters in issue, the Court affirmed the District Court's initial denial of disqualification.

> We think the district judge was plainly correct. There may have been matters within the firm which, had Schreiber worked on them, would have compelled disqualification here. But Schreiber denied having been entrusted with any such confidences. He was supported in this respect by the affidavits of Gurney and Baum. This was sufficient. *See Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, Inc.*, [224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956)]. *Id.* at 757.

As in *Gas-A-Tron* and *Petrol Stops*, the proponents of disqualification in *Silver Chrysler Plymouth* argued in generalized terms that the attorney's potential access to confidential information of Chrysler Motors in the files of his first employer cast a pall of impropriety over his subsequent representation of interests adverse to Chrysler. The Court of Appeals rejected their arguments out of hand, refusing to impute knowledge of wide-ranging client confidences to a young associate attorney in a large law firm in the absence of a strong evidentiary foundation.

> [I]t would be absurd to conclude that immediately upon their entry on duty they become the recipients of knowledge as to the names of all of the firm's clients, the contents of all files relating to such clients, and all confidential disclosures by client officers or employees to any lawyer in the firm. Obviously such legal osmosis does not occur. The mere recital of such a proposition should be self-refuting. And a rational interpretation of the Code of Professional Responsibility does not call for disqualification on the basis of such an unrealistic perception of the practice of law in large firms. *Id.* at 753-54.

Finding no substantial relationship between the attorney's prior work on behalf of Chrysler and his current representation adverse to Chrysler and no evidence to support the contentions of the attorney's imputed knowledge of client confidences, the *Silver* court declined to disqualify plaintiff's attorney.

No Canon of the Code of Professional Responsibility generally prohibits an attorney from bringing an action against a client of a firm with which he was previously associated. Disqualification is unwarranted unless the attorney has actually received or been exposed to client confidences during the course of a prior representation that relate to a current adverse representation. A rule prohibiting all representations adverse to former clients might provide some minor additional protection against the disclosure of confidential information. However, it would also limit many clients' access to adequate legal counsel in highly specialized areas of the law. Such a rule would rigidly and unnecessarily limit the careers of young lawyers and generally restrict the independence of the Bar. The Second Circuit rejected that rule in *Silver Chrysler Plymouth*, and the Ninth Circuit did the same in *Gas-A-Tron* and *Petrol Stops*.

In *Gas-A-Tron* and *Petrol Stops*, the Ninth Circuit carefully examined a record very similar to that in *Silver* and came to the same conclusion as the Court of Appeals for the Second Circuit — that disqualification was unwarranted. It would be totally unrealistic to ascribe to a young associate fresh out of law school knowledge of the confidential information contained in the closed files of a large law firm absent strong evidence to the contrary. That is not to say that law firm associates may not be privy to client confidences that would disqualify them from representing adverse interests once old relationships are severed. However, the fact alone of working on the same physical premises with the confidential files of a law firm's clients should not disqualify an attorney from opposing those clients during the course of a future association, and that is the heart of the Ninth Circuit's ruling reversing the district court's order of disqualification. As the Second Circuit stated in *Silver Chrysler Plymouth*:

> [T]he Canons . . . are intended to protect the confidences of former clients when an attorney has been in a position to learn them. To apply the remedy when there is no realistic chance that confidences were disclosed would go far beyond the purpose of those decisions. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari in these cases should be denied.

DATED this 28th day of August, 1976.

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APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 74-1104

SILVER CHRYSLER PLYMOUTH, INC.

Plaintiff-Appellee,

vs.

CHRYSLER MOTORS CORPORATION and
CHRYSLER REALTY CORPORATION,

Defendants-Appellants.

Appeal from an order of the United States District Court
for the Eastern District of New York,
Jack B. Weinstein, *Judge*,
denying a motion to disqualify plaintiff's counsel.

Before MOORE, ADAMS and MULLIGAN,
Circuit Judges.

Filed May 23, 1975

MOORE, Circuit Judge:

An action is pending before Judge Weinstein in the Eastern District of New York entitled *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation and Chrysler Realty Corporation.*[1] It awaits trial. The controversy alleged therein essentially is whether Silver Chrysler's dealership agreement with Chrysler was for five years (the term specified in a written lease executed between the parties in 1968) as asserted by Chrysler or for twenty-five years as alleged by Silver Chrysler on the basis of a 1967 agreement. This seemingly simple breach of contract complaint also contains a cause of action under the so-called Dealers' Day in Court Act, 15 U.S.C. § 1221 *et seq.* The claim alleges threats amounting to coercion or intimidation which forced Silver Chrysler under threat of eviction to sign a new agreement at a higher rental in May 1973 (the expiration date of the five-year term). This brief recital of the nature of the action is required only as a background to the issue on this appeal, which is disqualification of counsel.

Chrysler for many years has been represented by the law firm of Kelley Drye Warren Clark Carr & Ellis (Kelley Drye) and its predecessors, which also represents Chrysler in this action. Although many other law firms represent Chrysler on various matters throughout the country, only Kelley Drye is listed on Chrysler's annual reports as "Counsel." Silver Chrysler is represented by the firm of Hammond & Schreiber, P. C. Dale Schreiber of that firm had been employed as an associate by Kelley Drye, and while there worked on certain Chrysler matters. Because of this fact Kelley Drye by motion sought to disqualify both Schreiber and his firm from representing

[1]The Eastern District uses the individual assignment system. Hence the action is before Judge Weinstein for all purposes until disposition.

Silver Chrysler in this action. In support of, and in opposition to, the motion respectively, the parties submitted voluminous affidavits, copies of pleadings in cases in which Schreiber had allegedly worked, and extensive memoranda of law. With this material before him and after oral argument, the judge proceeded to analyze the motion on the theory that "[d]ecision turns on whether, in the course of the former 'representation,' the associate acquired information reasonably related to the particular subject matter of the subsequent representation." The Judge reviewed the subject matter of the cases on which Schreiber was claimed to have worked and the law as it appears in this Circuit from decided cases and in a comprehensive opinion (reported at 370 F.Supp. 581), concluded that "[d]isqualification of plaintiff's counsel is not warranted." From this decision Chrysler appeals.[2]

Our task on review is to endeavor to ascertain those general precepts which may influence or even control our decision and then relate them to the particular facts of this case. Fortunately, we have the benefit of recent pronouncements in the area by this Circuit. *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973). *See also Hull v. Celanese Corporation*, 513 F.2d 568 No. 74-2126 (2d Cir. 1975); *Ceramco, Inc.* v. *Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975); *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974). As in *Emle*, we recognize "our responsibility to preserve a balance, delicate though it may be, between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility." 478 F.2d at 564-65.

[2]The order was held appealable in *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (*en banc*).

A starting point is of necessity the code of Professional Responsibility. Canon 4 provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Canon 9 also cautions that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." But "ethical problems cannot be resolved in a vacuum." *Emle, supra,* at 656. Thorough consideration of the facts, as more elaborately set forth in the opinion below, is required.[3] Nor can judges exclude from their minds realities of which fair decision would call for judicial notice.

Upon graduation from law school in 1965, Dale Schreiber was hired by Kelley Drye to commence work in September 1965. He worked at the firm briefly before accepting a position as a law clerk to a federal judge. His work at Kelley Drye began again in September 1966 and continued to February 1969.

Kelley Drye is one of New York's larger law firms, having had at the time some 30 partners and 50 associates. Several of New York's firms have well over 100 associates and over 50 partners. Many firms hire a dozen or more law graduates each year and it has now become the practice to hire for summer work (usually between their second and third years at law school) a substantial number of law students. These "summer associates" most frequently perform tasks assigned to them by supervising associates or partners. Many of the summer students do not return to the same firms with which they have been associated or even remain in New York City. Even after an initial association with a firm upon graduation, it is not uncommon for young lawyers to change their affiliation once or even several times. It is equally well known that the larger firms in the metropolitan areas have hundreds (collectively thousands) of clients. It is unquestionably true that in the course of their work at large law firms, associates are entrusted with the confidences of some of their clients. But it would be absurd to conclude that immediately upon their entry on duty they become the recipients of knowledge as to the names of the firm's clients, the contents of all files relating to such clients, and all confidential disclosures by client officers or employees to any lawyer in the firm. Obviously such legal osmosis does not occur. The mere recital of such a proposition should be self-refuting. And a rational interpretation of the Code of Professional Responsibility does not call for disqualification on the basis of such an unrealistic perception of the practice of law in large firms.

Fulfilling the purpose of the disqualification remedy, "namely the need to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information" *Ceramco, Inc.* v. *Lee Pharmaceuticals, supra,* 510 F.2d at 271, does not require such a blanket approach. Nor are such broad measures required to maintain "in the public mind, a high regard for the legal profession" *General Motors Corp.* v. *City of New York, supra,* 501 F.2d at 649. Thus, while this Circuit has recognized that an inference may arise that an attorney formerly associated with a firm himself received confidential information transmitted by a client to the firm, that inference is a rebuttable one. *Laskey Bros. of W. Va., Inc.* v. *Warner Bros. Pictures,* 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied,* 350 U.S. 932, 76 S.Ct. 300, 100 L.Ed.2d 814 (1965); *United States v. Standard Oil Co.,*

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[3] As a district judge, now Chief Judge Kaufman, the author of the *Emle* opinion, said in *United States* v. *Standard Oil Company,* 136 F.Supp. 345, 367 (S.D.N.Y. 1955), while refusing to disqualify an attorney:

> When dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine and must be so marked. Guide-posts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.

136 F.Supp. 345, 364 (S.D.N.Y. 1955). And in *Laskey*, the court cautioned that:

> It will not do to make the presumption of confidential information rebuttable and then to make the standard of proof for rebuttal unattainably high. This is particularly true where, as here, the attorney must prove a negative, which is always a difficult burden to meet.

224 F.2d at 827. The importance of not unnecessarily constricting the careers of lawyers who started their practice of law at large firms simply on the basis of their former association underscores the significance of this language. *See generally* Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-firm Conflicts of Interest*, 73 Yale L.J. 1058 (1964).

The Circuit has also adhered to the rule enunciated by Judge Weinfeld in *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F.Supp. 265, 268 (S.D.N.Y.1953), that "where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited." And as to proof, Judge Weinfeld continued: "the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client" (p. 268). This case was the genesis of the now so-called "substantially related" test. But as the present Chief Judge of the Second Circuit Court of Appeals noted twenty years ago in *United States v. Standard Oil Company*, 136 F.Supp. 345, 355 (S.D.N.Y.1955): "[u]nfortunately, the cases furnish no applicable guide as to what creates a 'substantial' relationship." The cases available

at that time were cases in which the relationship was "patently clear."[4] *Id.*

Over the intervening years the cases in which disqualification has been granted have also fallen into, or have come close to, the "patently clear" category. A review of some of the more recent decisions is illustrative.

In *Hull* v. *Celanese Corp.*, *supra*, an attorney who had worked in defense of the same case in the legal department of Celanese sought to join forces (albeit as a client) with the group suing Celanese and to be represented by the very law firm she had been opposing. The trial court initially denied the motion of the attorney to intervene, and little wonder that both trial and appellate court considered the opportunity for disclosure of confidential information to require disqualification of the law firm, Judge Tenney saying on appeal: "Also, here the matter at issue is not merely 'substantially related' to the previous representation, rather, it is exactly the same litigation." 513 F.2d at 571.

In *General Motors Corp.* v. *City of New York, supra*, Reycraft, the attorney whose disqualification was in issue, while formerly serving with the Department of Justice in Washington, undisputedly "had substantial responsibility" in initiating a Government suit against General Motors alleging monopolization or attempted monopolization of the nationwide market for sale of buses. After returning to private practice, Reycraft sought to represent the City of New York in an antitrust suit against General Motors also claiming monopolization of bus sales. This court found that his subsequent action was "sufficiently similar to

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[4] The court noted that "[n]o such glaringly obvious relationship exists in this case" and, applying a substantial relationship test, refused to disqualify counsel. 136 F.Supp. at 355-59.

the 1956 *Bus* (United States v. General Motors No. 15816, E.D.Mich.1956) case to be the same 'matter' under DR 9-101(B).'"[5] 501 F.2d at 650. Therefore disqualification was properly directed.[6] Recently in *Ceramco, Inc.* v. *Lee Pharmaceuticals, supra,* we interpreted the facts in *General Motors Corp.* as a case wherein the "matter . . . was almost identical to the dispute for which [Reycraft's] retention was sought." 510 F.2d at 271.

In *Emle Industries, Inc.* v. *Patentex, Inc., supra,* this court used the "substantially related" test as a guidepost in applying Canon 4 and disqualified the lawyer who represented Burlington Industries, Inc. as a client and then turned about to represent a client suing a Burlington subsidiary. The court found that "there are matters in controversy in each case — both the nature and scope of control, if any, exercised by Burlington, over Patentex — that are not merely 'substantially related,' but are in fact identical." 478 F.2d at 572.

In *Richardson* v. *Hamilton International Corp.,* 469 F.2d 1382 (3d Cir. 1972), *cert. denied,* 411 U.S. 986, 93 S.Ct. 2271, 36 L.Ed.2d 964 (1973), Richardson had been an associate at a law firm representing Hamilton in connection with an SEC investigation of possible securities law violations. He had been vested with substantial responsibility in the matter, having interviewed Hamilton's officers and directors, discussed their forthcoming testimony, and mapped the strategy for presentation of the case. Quite obviously he had been the recipient of such informa-

[5]DR 9-101(B) directs:

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

[6]However, the court recognized that: "If, for example, Reycraft had not worked on the 1956 *Bus* case, but was simply a member of the Antitrust Division at that time, a case not unlike *Esso Export* [136 F.Supp. 345] would be before us." 501 F.2d at 652.

tion that he was not free to represent persons suing Hamilton on matters pertaining to a false and misleading proxy statement.

In *Chugach Elec. Ass'n* v. *United States District Court,* 370 F.2d 441 (9th Cir. 1966), disqualification was ordered where for some years the attorney involved had been General Counsel for Chugach. This attorney then appeared as counsel in an antitrust action against Chugach. This situation is "patently clear."

In *Motor Mart, Inc.* v. *Saab Motors, Inc.,* 359 F.Supp. 156, 157 (S.D.N.Y.1973), Motor Mart's attorney, in the course of his former service as Saab's counsel, had represented Saab in "essentially the same type of suit" (unlawful termination of an automobile dealership). He thus had had an opportunity to learn of Saab's policies, practices and procedures. It would have been a violation of his ethical obligations to turn this acquired knowledge against his former client.[7]

In contrast to the foregoing decisions, quite a different situation is presented here. Schreiber was not counsel for Chrysler in the sense that the disqualified attorneys were in those cases. Although Kelley Drye had pervasive contacts with Chrysler, Schreiber's relationship cannot

[7]Our attention has been drawn to three district court cases, each dealing with the same attorney and his former association with a Los Angeles law firm that had represented Shell Oil Company in certain matters. *Gas-A-Tron of Arizona* v. *Union Oil Company of California,* No. Civ. 73-292-TUC-WCF (D. Ariz., decided Aug. 27, 1974) (consolidated for purposes of memorandum and order with *Petrol Stops Northwest* v. *Continental Oil Co.,* No. Civ. 73-212-TUC-JAW); *Redd* v. *Shell Oil Co.,* Civil No. C-104-71 (D. Utah, decided Dec. 2, 1974); *Bonus Oil Co. v. American Petrofina Co.,* No. CV73-L-165 (D. Neb., decided May 1, 1974). The court in *Gas-A-Tron* granted a motion to disqualify the attorney and his new law firm. The courts in *Redd* and *Bonus Oil Co.* declined to do so. These three cases were similar in nature, and all three courts purported to apply the "substantially related" test. The evidence introduced pertaining to the activities of the attorney at his former firm was apparently nearly identical in each case, however, the *Gas-A-Tron* court characterized it quite differently than the other two. Without examining the full records in these cases, we would not care to hazard a conclusion as to which result was more appropriate.

be considered co-extensive with that of his firm. The evidence submitted to Judge Weinstein on the motion was admittedly somewhat conflicting. By affidavits submitted by the head of the litigation department at Kelley Drye, Chrysler sought to show not only the purportedly "substantially related" cases upon which Schreiber worked but also the extensive amount of Chrysler-dealer litigation in the office and in which Schreiber was concededly not involved. Schreiber responded by affidavit, detailing his responsibilities in Chrysler matters upon which he recalled working. Schreiber also obtained, amongst other things, supporting affidavits of Clark J. Gurney (the associate who handled the bulk of Chrysler dealer matters) and Hugh M. Baum, two former colleagues at Kelley Drye (presently employed elsewhere).

As we recently recognized in *Hull* v. *Celanese Corp.*, *supra*:

> The district court bears the responsibility for the supervision of the members of its bar. . . . The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place.

513 F. 4 at 571. *See also Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382, 1386 (3d Cir. 1972), *cert. denied*, 411 U.S. 986, 93 S.Ct. 2271, 36 L.Ed.2d 964 (1973). Judge Weinstein was well aware of the tests to be applied. He examined (370 F.Supp. at 585-86) *Checker* v. *Chrysler*, an antitrust action and Schreiber's principal Chrysler case while at Kelley Drye, and concluded that the case was not substantially related to this litigation. As to other matters that Schreiber recalled working on, the judge was entitled to conclude that they also were not substantially related (*Ezzes* v. *Ackerman; Abikkarm* v. *Chrysler; Chrysler*

Motors Corp. v. *Toffany; Polk* v. *Cross & Brown*). With respect to still others (*Bayside Motors, Inc.* v. *Chrysler; Long Island Motors, Inc.* v. *Chrysler; DiCarlo Dodge, Inc.* v. *Chrysler; Rocco Motors* v. *Chrysler; Buono Sales, Inc.* v. *Chrysler Motors Corp.; Chrysler Motors Corp* v. *Estree Co.*) there was ample basis for crediting Schreiber's denial of having worked on them and concluding that Schreiber's involvement was, at most, limited to brief, informal discussions on a procedural matter or research on a specific point of law. The affidavits of Gurney and Baum provided support for such a conclusion. In this respect we do not believe that there is any basis for distinguishing between partners and associates on the basis of title alone — both are members of the bar and are bound by the same Code of Professional Responsibility. *See Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920, 927 (2d Cir. 1954). But there is reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions. In large firms at least, the former are normally the more seasoned lawyers and the latter the more junior. This is not to say that young attorneys in large firms never become important figures in certain matters but merely to recognize that some of their work is often of a far more limited variety. Under the latter circumstances the attorney's role cannot be considered "representation" within the meaning of *T. C. Theatre Corp.* and *Emle* so as to require disqualification. Those cases and the canons on which they are based are intended to protect the confidences of former clients when an attorney has been in a position to learn them. To apply the remedy when there is no realistic chance that confidences were disclosed would go far beyond the purpose of those decisions.

Chrysler was in a position here conclusively to refute Schreiber's position that his role in these cases had been non-existent or fleeting. Through affidavits of those who supervised Schreiber on particular matters or perhaps through time records, the issue was capable of proof. Chrysler instead chose to approach the matter in largely conclusory terms.[8] We cannot realistically subscribe to the contention that proof submitted for this limited purpose, by time records or otherwise, would have necessitated disclosure of any confidences entrusted to Kelley Drye.

Judge Weinstein also concluded that Schreiber had rebutted any inference, arising merely from his former association with Kelley Drye, that he possessed confidences that can be used against Chrysler in this lawsuit. We think the district judge was plainly correct. There may have been matters within the firm which, had Schreiber worked on them, would have compelled disqualification here. But Schreiber denied having been entrusted with any such confidences. He was supported in this respect by the affidavits of Gurney and Baum. This was sufficient. See *Laskey Bros. of W. Va., Inc.* v. *Warner Bros Pictures, Inc.*, *supra*, at 827.

Finally, in view of the conclusion that Schreiber's work at Kelley Drye does not necessitate disqualification, we agree with the district court that refusal to disqualify Schreiber and his firm will not create an appearance of impropriety. Neither Chrysler nor any other client of a law firm can reasonably expect to foreclose either all lawyers formerly at the firm or even those who have represented it on unrelated matters from subsequently

[8]Example from a Kelley Drye (Chrysler) affidavit:
"[Schreiber] obtained unmeasurable confidential information regarding the practices, procedures, methods of operation, activities, contemplated conduct, legal problems, and litigations of [Chrysler]." J.A. 29a.

representing an opposing party. Although Canon 9 dictates that doubts should be resolved in favor of disqualification, *Hull* v. *Celanese Corp.*, *supra*, 513 F.2d at 571, it is not intended completely to override the delicate balance created by Canon 4 and the decisions thereunder.

A decision to sustain Judge Weinstein's denial of the motion does not diminish the force of our decisions which hold that the right of the public to counsel of its choice or the possibility of a reduction of "both the economic mobility of employees and their personal freedom to follow their own interests." (Blake, *Employee Agreements not to Compete*, 73 Harv.L.Rev. 625, 627 (1960)), must be secondary considerations to the paramount importance of "maintaining the highest standards of professional conduct and the scrupulous administration of justice." *Hull v. Celanese Corp.*, *supra*, 513 F.2d at 569.[9]

Judge Weinstein has seen and heard counsel for the litigants and appraised the worth of their proofs and arguments. He has suggested that "[t]he parties should endeavor to complete preparations for trial so that this simple case can be speedily disposed of. . . ." If during such further preparation, or even during the trial itself, there should appear indications that confidential information not apparent from the proof submitted thus far is being used, the trial judge will be available for such action as may be appropriate.[10]

[9]We cannot endorse Judge Weinstein's comments appearing at 370 F.Supp. at 591 pertaining to the possible antitrust implications of limitations on the ability of associates to represent interests opposing clients of former firms. The Supreme Court presently has pending before it a question of the Sherman Act's application to the legal profession and, in particular, minimum fee schedules. *Goldfarb* v. *Virginia State Bar*, No. 74-70 [420 U.S. 944, 95 S.Ct. 1323, 43 L.Ed.2d 422] (argued April 1, 1975). Whatever the decision in that case, we would think it inappropriate to relax ethical standards directed at preserving a sound attorney-client relationship in the name of the anti-trust laws. As long as the "substantially related" test is employed, we perceive no conflict between the two.

[10]In *W. E. Bassett Company* v. *H. C. Cook Company*, 201 F.Supp. 821 (D. Conn. 1962), *aff'd*, 302 F.2d 268 (2nd Cir. 1962), the trial court became

Order affirmed.

ADAMS, *Circuit Judge* (concurring):

In this case the plaintiff, Silver Chrysler Plymouth, Inc., presents breach of contract claims against Chrysler Motors Corp. based on diversity jurisdiction and on the Dealers Day in Court Act.[1] Chrysler Motors seeks to disqualify plaintiff's attorney, Dale A. Schreiber, formerly an associate in the law firm that is, and for an extended period of time has been, counsel to Chrysler Motors ("Kelley Drye"). During his tenure at Kelley Drye, Mr. Schreiber worked on numerous matters relating to Chrysler Motors, and Chrysler alleges that, deriving from such association, Mr. Schreiber acquired confidential information that would make his continuation on the present case unethical under the Code of Professional Responsibility.

Our role as an appellate tribunal is, of course, a limited one. We are asked to review the facts found below to determine whether they are clearly in error, and to ascertain whether the legal tests applied are correctly formulated.[2]

I like the majority and the trial court, I believe that the relevant test for disqualification of an attorney under Canons Four and Nine of the Code of Professional Re-

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verted to the possibility of conflict as the result of a motion made pursuant to Rule 34 of the Federal Rules of Civil Procedure seeking disclosure of certain documents. (Items 12 and 13.) The Rule 34 motion brought to the forefront, by the nature of the material requested, the fact that the challenged attorney had individually represented Bassett prior to becoming a partner of the firm which represented Cook. Disqualification was ordered because "a *present* partner of [the challenged attorney] had actually represented one of the defendants in connection with some of the very same issues raised by the very same plaintiff." 201 F.Supp. at 824 (emphasis in original.)

[1] 15 U.S.C. § 1221 et seq. (1974).

[2] *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954); *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946); *Van Meter* v. *United States*, 47 F.2d 192 (2d Cir. 1931).

sponsibility is the test articulated by Judge Weinfeld in *T. C. Theatre Corp.* v. *Warner Brothers Pictures, Inc.*, and reaffirmed on a number of occasions by this Court.[3] "Where any substantial relationship can be shown between the subject matter of the former representation and that of a subsequent adverse representation, the latter will be prohibited."[4]

In this context, the question of "a substantial relationship" between the two matters is not one whose dimensions are delineated with mathematical precision. However, a case presenting an apt frame of comparison to the present suit is *Motor Mart, Inc.* v. *Saab Motors, Inc.*[5] There, disqualification of plaintiff's attorney was ordered in a Dealers Day in Court case. The challenged attorney had previously represented Saab "as its counsel on a regular basis" for a five-year period, during which time he had defended Saab in a state action characterized as "essentially the same type of suit" as the *Motor Mart* case.[6]

Surely, were the proof to disclose that, while at Kelley Drye, Mr. Schreiber had worked in any significant respect on a case implicating issues "essentially the same" as those in dispute here, his disqualification would appear to be mandated. This is so because, given the identity of issues between the earlier and present cases, Mr. Schreiber would be unable to overcome the inference that he was privy to client disclosures germane to the case here, and the appearance of impropriety would be suffi-

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[3] *Hull v. Celanese Corp.*, No. 74-2126, 513 F.2d 568 (2d Cir. 1975); *Ceramco, Inc.* v. *Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975); *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973).

[4] 113 F.Supp. 265, 268 (S.D.N.Y. 1953).

[5] 359 F.Supp. 156 (S.D.N.Y. 1973).

[6] *Id.* at 157.

ciently strong so as to prohibit his continued subsequent representation.

The district court investigated, thoroughly and meticulously, the serious charges brought forward by Chrysler against Mr. Schreiber. Chrysler did not persuade the district court that Mr. Schreiber, as a Kelley Drye associate, had maintained any but a peripheral involvement in a Chrysler matter bearing a substantial relationship to the matters at issue here. Based on the proof, the district court undertook to catalog Mr. Schreiber's professional work while at Kelley Drye. The evidence credited by the district court included two affidavits, one by Mr. Schreiber himself, recollecting his cumulative participation in Chrysler matters, and the other by Mr. Clark J. Gurney, a former associate at Kelley Drye who, at the time in question, was the senior associate primarily responsible for Chrysler dealer litigation. These two affidavits complemented each other and disclosed that, generally, cases with which Mr. Schreiber was concerned raised factual and legal issues remote from the allegations in the present case. Mr. Gurney stated that Mr. Schreiber "did not work directly or indirectly on Chrysler dealer cases with the possible exception of researching a few specific points of law that may have been involved in a dealer case." One example of such legal research had been documented in the affidavit by Mr. Sereiber.

Chrysler was at liberty to substantiate its broad claims that Mr. Schreiber had acquired confidences requiring disqualification. Evidence of his participation in any material aspect of a dealer litigation might well have provided support sufficient to sustain the defendant's disqualification motion. The district judge suggested possible methods by which Chrysler might counter the affidavits, without breaching the very confidences that it was

attempting to preserve. In particular, supportive data might have included the production of time sheets maintained by Kelley Drye that would disclose in detail Mr. Schreiber's work on Chrysler matters related to the case at hand. No such evidence was forthcoming. Considering all the testimony and other material before it, the district judge made a finding that "the evidence demonstrates that there was no actual knowledge" by Mr. Schreiber of pertinent, confidential information from Chrysler.[7]

Having found that Mr. Schreiber obtained no actual knowledge that would operate to disqualify him, the district court proceeded to acknowledge its obligation to guard against an appearance of impropriety in a case such as this. Public confidence in the integrity of legal institutions serves as an over-arching consideration beneath which attorneys practice their profession. The semblance of unethical behavior by practitioners may well be as damaging to the public image as improper conduct itself. Thus, charges of potential abuse of client communications merit close scrutiny by courts. In questions such as these, judges are in effect the caryatids charged with upholding the highest of ethical standards in the legal profession.

It cannot be gainsaid that in a civil suit[8] disqualification is in order where any inference can reasonably be maintained that client confidences may have been, or will be, violated. Here Kelley Drye has demonstrated only tangential involvement by Mr. Schreiber in any case related to the matter here. Therefore, Kelley Drye's allegations would be tantamount to a claim that showing of

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[7] 370 F.Supp. 581, 586 (E.D.N.Y. 1973).

[8] Additional, constitutional considerations are presented in the criminal field. *See, United States* v. *Wisniewski*, 478 F.2d 274 (2d Cir. 1973); *United States* v. *Sheiner*, 410 F.2d 337 (2d Cir.), *cert. denied*, 396 U.S. 825, 90 S.Ct. 68, 24 L.Ed.2d 76 (1969).

previous work by an attorney for a client would, without more, preclude any subsequent representation antagonistic to the client by the attorney. While the courts must apply the Canons broadly, and are admonished to draw the line at the first hint of unethical behavior, it would not appear appropriate to disqualify attorneys in such a sweeping and speculative fashion.

Rather, disqualification would seem to depend on a more refined assessment of the earlier and later cases. This analysis must be done, in the first instance, by the trial court. The trial judge should focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with the cases. As part of its review, the court should examine the time spent by the attorney on the earlier cases, the type of work performed, and the attorney's possible exposure to formulation of policy or strategy. Where a threshold quantum of similarity exists between the prior and current representations, courts must be scrupulous to ensure that even the appearance of impropriety is avoided.

The district court stated that, in order to justify disqualification, "Actual activities on specific cases by Schreiber must be demonstrated which would make it reasonable to infer that he gained some information about his former client of some value to his present client."[9] However, following a careful and conscientious review of the facts before it, the district court determined that the requisite showing of such a relationship was absent. I cannot conclude that such finding is erroneous.

Accordingly, I concur in the judgment affirming the district court. In so doing, however, candor requires that

[9]370 F.Supp. at 589.

I express misgivings respecting the wisdom of attorneys accepting representations when former clients are involved. Although it was not established that the representation here warrants disqualification, my concurrence should not be understood as an approval of the practice, a practice which ofttimes necessitates an examination of the obligation due a former law firm and client, and imposes on the court the duty to probe the outer reaches of the Canons of Ethics.

APPENDIX B

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

ETHICAL CONSIDERATIONS

EC 1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

DR 1-102

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to

the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend.

A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and

"secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL CONSIDERATIONS

EC 9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

EC 9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

DR 9-101 Avoiding Even the Appearance of Impropriety.

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

CERTIFICATE OF SERVICE

I do hereby certify that on this 30th day of August, 1976, three copies of this BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI were mailed to each of the following, by depositing same, postage prepaid, in the United States mail.

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